



Indefinite War: Unsettled International Law on the End of Armed Conflict

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The background of the cover is a dark, grainy photograph showing the silhouettes of soldiers in military gear. They are positioned behind a series of horizontal barbed wire strands. The lighting is low, creating a somber and tense atmosphere. The title 'INDEFINITE WAR' is overlaid in large, white, sans-serif capital letters.

INDEFINITE WAR

UNSETTLED
INTERNATIONAL LAW
ON THE END OF ARMED CONFLICT

DUSTIN A. LEWIS, GABRIELLA BLUM, AND NAZ K. MODIRZADEH

HARVARD LAW SCHOOL PROGRAM ON INTERNATIONAL LAW AND ARMED CONFLICT

LEGAL BRIEFING • FEBRUARY 2017

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EXECUTIVE SUMMARY

Can we say, definitively, when an armed conflict no longer exists under international law? The short, unsatisfying answer is *sometimes*: it is clear when some conflicts terminate as a matter of international law, but a decisive determination eludes many others. The lack of fully-settled guidance often matters significantly. That is because international law tolerates, for the most part, far less violent harm, devastation, and suppression in situations other than armed conflicts. Thus, certain measures governed by the laws and customs of war—including killing and capturing the enemy, destroying and seizing enemy property, and occupying foreign territory, all on a possibly large scale—would usually constitute grave violations of peacetime law.

This Legal Briefing details the legal considerations and analyzes the implications of that lack of settled guidance. It delves into the myriad (and often-inconsistent) provisions in treaty law, customary law, and relevant jurisprudence that purport to govern the end of war. Alongside the doctrinal analysis, this Briefing considers the changing concept of war and of what constitutes its end; evaluates diverse interests at stake in the continuation or close of conflict; and contextualizes the essentially political work of those who design the law.

A diverse array of individuals and entities has a stake in the end of armed conflict: from political leaders to military commanders, from civilian populations to neutral states, from asylum seekers to war-crimes courts, from arms-transferring states to human-rights bodies, from state-responsibility compensation mechanisms to humanitarians. Each stakeholder may have their own sets of interests in the continuation or the end of a war and in the corresponding continuation or termination of the applicability of the international-legal framework of armed conflict.

There is considerable fragmentation in the contemporary *lex scripta* (written or codified law) concerning the end of armed conflict under international humanitarian law (IHL). That fragmentation arises in part because:

- Various IHL treaties lay down different formulations—and certain IHL treaties contain different formulations within a single instrument—concerning relevant duties, rights, authorities, and protections that arise before, at the moment of, or after the termination of the armed conflict;
- Not all states have contracted into the same sets of IHL treaties; and
- Not all end-of-armed-conflict IHL treaty provisions apply, at least as a matter of treaty law, to all international armed conflicts (IACs) and non-international armed conflicts (NIACs), or even to all IACs or to all NIACs.

While customary IHL could, in principle, help resolve that fragmentation and fill in the corresponding gaps, it is far from clear that it does so in practice.

Meanwhile, diverse contemporary scenarios pose challenges to ending, and to discerning the end of, war under the relevant international-legal framework of armed conflict. Examples fall along such lines as not recognizing the existence of an armed conflict in the first place; difficulties in classifying conflicts and identifying parties; not adhering to or unclarity about the status of agreements between adverse

parties; long-term enmity marked by intermittent violence; and state responses to terrorism that blend traditional notions of war and law enforcement.

NIACs are the most common type of contemporary armed conflict. Yet there are fewer IHL provisions and rules concerning how NIACs end compared to IACs. Even for the relatively thicker set of IHL provisions pertaining to IACs, many of the end-of-war formulations are subject to conflicting and wide-ranging interpretations.

Drawing from existing international law and scholarly arguments, we postulate four theories on the end-point of the application of the international-legal framework of armed conflict in relation to NIAC:

- The **two-way-ratchet theory**: as soon as at least one of the constituent elements of the NIAC—intensity of hostilities or organization of the non-state armed group—ceases to exist;
- The **no-more-combat-measures theory**: upon the general close of military operations as characterized by the cessation of actions of the armed forces with a view to combat;
- The **no-reasonable-risk-of-resumption theory**: where there is no reasonable risk of hostilities resuming; and
- The **state-of-war-throwback theory**: upon the achievement of a peaceful settlement between the formerly-warring parties.

In connection with the end of armed conflict under international law, deprivation of liberty and targeting in direct attack are two of the key stakes that arise in relation to the U.S.'s War on Terror. According to the Obama Administration, the purported armed conflict(s) will persist until a “tipping point” when terrorist organizations’ operational capacity is degraded and their supporting networks are dismantled to such an extent that those organizations’ forces will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the U.S. Yet through recent U.S. jurisprudence, practice, and doctrine, a complicated mixture has arisen: various purported armed conflicts against terrorist organizations interwoven with “direct action” against terrorist threats outside the United States and “areas of active hostilities.” This mixture has made it difficult to ascertain the scope—including the end—of those conflicts.

In all, this Legal Briefing reveals that international law, as it now stands, provides insufficient guidance to precisely discern the end of many armed conflicts as a *factual matter* (when *has* the war ended?), as a *normative matter* (when *should* the war end?), and as a *legal matter* (when does the international-legal framework of armed conflict *cease to apply* in relation to the war?). The current plurality of legal concepts of armed conflict, the sparsity of IHL provisions that instruct the end of application, and the inconsistency among such provisions thwart uniform regulation and frustrate the formulation of a comprehensive notion of when wars can, should, and do end.

Fleshing out the criteria for the end of war is a considerable challenge. Clearly, many of the problems identified in this Briefing are first and foremost strategic and political. Yet, as part of a broader effort to strengthen international law’s claim to guide behavior in relation to war, international lawyers must address the current confusion and inconsistencies that so often surround the end of armed conflict.

CREDITS

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The Harvard Law School Program on International Law and Armed Conflict (HLS PILAC) provides a space for research on critical challenges facing the various fields of public international law related to armed conflict, including the *jus ad bellum*, the *jus in bello* (international humanitarian law/the law of armed conflict), international human rights law, international criminal law, and the law of state responsibility. Its mode is critical, independent, and rigorous. HLS PILAC's methodology fuses traditional public international law research with targeted analysis of changing security environments. The Program does not engage in advocacy. While its contributors may express a range of views on contentious legal and policy debates, HLS PILAC does not take institutional positions on these matters.

About the Authors

Dustin A. Lewis is a Senior Researcher at HLS PILAC. Gabriella Blum, the Faculty Director of HLS PILAC, is the Rita E. Hauser Professor of Human Rights and Humanitarian Law at Harvard Law School. And Naz K. Modirzadeh, the Founding Director of HLS PILAC, is a Professor of Practice at Harvard Law School.

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Cover Image

The U.S. Army, "Razor wire perimeter," March 19, 2010, Creative Commons Attribution 2.0 Generic (CC BY 2.0) License, <https://www.flickr.com/photos/soldiersmediacenter/4460092134/> <<https://perma.cc/NN39-C649>> (caption provided by the U.S. Army: "U.S. Soldiers fortify an Afghan police checkpoint by placing razor wire around the perimeter in Robat, Afghanistan, March 19, 2010. The soldiers are assigned to Bear Troop, 8th Squadron, 1st Cavalry Regiment").

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indefinite /ɪn 'dɛfɪnət/

1. Lasting for an unknown or unstated length of time

Origin: Mid-16th century: from Latin indefinitus,
from in- not + definitus defined, set within limits.

—OXFORD LIVING DICTIONARIES: ENGLISH (OUP 2017),
<https://en.oxforddictionaries.com/definition/indefinite>
<<https://perma.cc/9RGK-9L4Q>>

1

INTRODUCTION

UNSETTLED GUIDANCE IN AN ERA OF PERSISTENT CONFLICT

Can we say, definitively, when an armed conflict no longer exists under international law? The short, unsatisfying answer is *sometimes*: it is clear when some conflicts terminate as a matter of international law, but a decisive determination eludes many others.¹ To give one concrete example, ascertaining whether conflict in Afghanistan and elsewhere continues is key to determining the legal power of the United States, at least as far as international law goes, to keep holding certain detainees at the Naval Base at Guantánamo Bay, Cuba—a question that has come before U.S. courts repeatedly.²

The lack of fully-settled guidance often matters significantly. That is because international law tolerates, for the most part, far less violent harm, devastation, and suppression in situations other than armed conflicts. Thus, certain measures governed by the laws and customs of war—including killing and capturing the enemy, destroying and seizing enemy property, and occupying foreign territory, all on a possibly large scale—would usually constitute grave violations of peacetime law. The rules on the conduct of hostilities, for instance, contemplate that the use of lethal force against persons is *inherent* to waging war.³ By comparison, under law-enforcement principles governed by international human rights law, the use of lethal force may be used only as a last resort and only when other means are ineffective.⁴

1. Sections 4 and 5, *infra*, sketch the plurality of legal concepts of armed conflict under contemporary international law. In this Legal Briefing, at times we refer to those concepts—such as international armed conflict, a state of war in the legal sense, belligerent occupation, recognition of belligerency, and non-international armed conflict—in their respective technical senses. But at many other points we refer variously to “war” and “armed conflict” as generic terms meant to encapsulate, for ease of reading, the plurality of possibly-relevant technical legal concepts.

2. See *infra* Section 7.

3. See Jelena Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 105 (Elizabeth Wilmschurst ed., 2012) [hereinafter, “Pejic, *Use of Force*”] (and further explaining that, while that “body of rules aims to avoid or limit death and other harm, particularly of civilians, [it] recognizes that the very nature of armed conflict is such that loss of life cannot be entirely prevented”). *Id.* See generally INTERNATIONAL COMMITTEE OF THE RED CROSS, *THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS*, Nov. 2013 [hereinafter, “ICRC, *USE OF FORCE*”].

4. See, e.g., Prosecutor v. Ljube Bošković and Johan Tarčulovski, Judgment, ICTY Trial Chamber II, IT-

Today, visions of perpetual war mix with knotty factual scenarios and often-unsettled international-legal guidance on the end of armed conflict. Well into its second decade, the United States' "War on Terror"⁵ shows little prospect of abating.⁶ In 2009, the U.S. Army envisaged an era of persistent conflict, extending at least from 2016 to 2028.⁷ More broadly, contemporary armed conflicts frequently "result in unstable cease-fires, continue at a lower intensity, or are frozen by an armed intervention by outside forces or by the international community. Hostilities, or at least acts of violence with serious humanitarian consequences, often break out again later."⁸

04-82-T, July 10, 2008, ¶ 178 [hereinafter, "*Boškoski*, Trial Judgement"] (stating that, "in situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force, but, where applicable, human rights law restricts such usage to what is no more than absolutely necessary and which is strictly proportionate to certain objectives") (citations omitted). *See generally* Pejic, *Use of Force*, *supra* note 3, at 111 (stating also that "such [other] means must always be available"). *Id.* *See infra* Section 3 concerning other legal stakes of the (ongoing) existence (or not) of an armed conflict.

5. President Obama withdrew the use of the phrase "global war on terror" and instead defined his Administration's approach to the relevant U.S. effort as "a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America." *Remarks by the President at the National Defense University*, May 23, 2013 (stating that, "[b]eyond Afghanistan, we must define our effort not as a boundless 'global war on terror,' but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America"). Yet other parts of the U.S. government continue to invoke the "war on terror" and to appropriate funding under the "Global War on Terror." *See, e.g.*, *Ameur v. Gates*, 759 F.3d 317, 328 (4th Cir. 2014) ("Section 2241(e)(2) survives rational-basis review, a 'deferential' standard that asks only whether Congress had a 'reasonable basis for adopting the classification.' That 'reasonable basis' is evident for § 2241(e)(2), as the statute is meant to limit court interference in our nation's war on terror") (emphasis added; citations omitted). With respect to appropriations, the "Overseas Contingency Operations/Global War on Terrorism" (OCO/GWOT) designations were first in effect for FY2012 appropriations. *See* Susan B. Epstein and Lynn M. Williams, *Overseas Contingency Operations Funding: Background and Status* 5–6, CONG. RES. SERV., Jun. 13, 2016. Funds designated "OCO/GWOT" "are not subject to procedural limits on discretionary spending in congressional budget resolutions, or the statutory discretionary spending limits provided through the Budget Control Act of 2011 (BCA)." *Id.* at 1 (citations omitted). Having used the OCO/GWOT exemption for the Department of Defense, Congress also adopted this approach for foreign-affairs agencies, with funds being provided under the first foreign-affairs OCO/GWOT appropriation for a wide range of recipient countries, including Yemen, Somalia, Kenya, and the Philippines and for the Global Security Contingency Fund. *Id.* at 6.

6. *See, e.g.*, Samuel Moyn, *Endless War Watch*, *Winter 2017*, LAWFARE, Feb. 13, 2017, <https://www.lawfareblog.com/endless-war-watch-winter-2017> <<https://perma.cc/3QBV-4QS2>>; Samuel Moyn, *Why the War on Terror May Never End*, *N.Y. TIMES*, June 24, 2016, <https://www.nytimes.com/2016/06/26/books/review/spiral-by-mark-danner.html> <<https://perma.cc/BU8A-LLYK>> (reviewing MARK DANNER, *SPIRAL: TRAPPED IN THE FOREVER WAR* (2015)); Adam Klein, *When Does the War on Terror End?*, LAWFARE, Apr. 18, 2016, <https://www.lawfareblog.com/when-does-war-terror-end-0> <<https://perma.cc/7Q8P-LXM8>>; Adam Klein, *Part II: Terrorist Groups and the Law of How Wars End*, LAWFARE, Apr. 19, 2016, <https://www.lawfareblog.com/part-ii-terrorist-groups-and-law-how-wars-end> <<https://perma.cc/S4KK-JLQH>>; Samuel Moyn, "War Time: An Idea, Its History, Its Consequences," by Mary L. Dudziak, LAWFARE, May 24, 2012, <https://www.lawfareblog.com/war-time-idea-its-history-its-consequences-mary-l-dudziak> <<https://perma.cc/AZ8N-NLVP>> (reviewing MARY L. DUDZIAK, *WAR TIME* (2012)).

7. *See* U.S. Training and Doctrine Command Pamphlet 525-3-0, *The Army Capstone Concept, Operational Adaptability: Operating under Conditions of Uncertainty and Complexity in an Era of Persistent Conflict*, 2016–2028.

8. MARCO SASSÒLI, ANTOINE A. BOUVIER, AND ANNE QUINTIN, *I HOW DOES LAW PROTECT IN WAR?* 34 (3d ed., 2011).

Rare, in short, is the decisive end-point of a contemporary war. Much more common are violent enmities toggling on and off, sometimes over very long periods. An assessment of armed conflicts that existed at least at some point in 2014 (the most recent year analyzed) identified 13 conflicts of an international character and 29 conflicts of a non-international character.⁹ In several of those theaters, traditional elements of military, law-enforcement, and peace-keeping operations blended into protean combinations. The resulting amalgams often defied easy classification under international law. Moreover, many measures traditionally reserved for armed conflict are increasingly being directed, especially in response to terrorist threats, at individuals or small groups, not at political collectives. In the process, war seems to lose some of its traditional inter-collective logic.¹⁰ Further, in some domains—not least in the realm of cyber operations—there is vanishingly little consensus among states and commentators on what, exactly, may give rise to an armed conflict in the first place, let alone what marks its end.

Against that backdrop, it is worth exploring a detailed legal analysis and discussing the implications of international law, as it currently stands, not providing sufficient guidance to detect when many armed conflicts end and when the relevant international-legal framework of armed conflict ceases to apply in relation to them.¹¹ Diverse additional imperatives compel our exploration as well. A starting point to bolster the normative regime is to grasp existing law. Not knowing when wars end risks unwittingly supporting endless wars and thereby sanctioning, if tacitly, unlawful harm.¹² And despite significant recent contributions,¹³ calls for further

9. See THE WAR REPORT: ARMED CONFLICT IN 2014 23–25 (ed. Annysa Bellal, 2015). The Rule of Law in Armed Conflicts Project (RULAC) maintains a website that seeks to “systematically qualify situations of armed violence using the definition of armed conflict under international humanitarian law.” See Geneva Academy of International Humanitarian Law and Human Rights, *Rule of Law in Armed Conflicts Project*, <http://www.rulac.org/> <<https://perma.cc/KH2W-KY68>>.

10. See Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, in LAW AND WAR (Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey eds., 2014).

11. The primary IHL treaties that we will examine include Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. 3362 [hereinafter, “GC I”]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. 3363 [hereinafter, “GC II”]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. 3364 [hereinafter, “GC III”]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3365 [hereinafter, “GC IV”]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter, “AP I”]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter, “AP II”].

12. See, e.g., MARY L. DUDZIAK, WAR TIME (2012); Fionnuala Ní Aoláin, “Anything Can Happen:” *Interpreting the ‘End’ of War*, 49 TULSA L. REV. 569 (2013) (reviewing THOMAS U. BERGER, WAR, GUILT, AND WORLD POLITICS AFTER WORLD WAR II (2012), LARRY MAY, AFTER WAR ENDS: A PHILOSOPHICAL PERSPECTIVE (2012), and KIMBERLY THEIDON, INTIMATE ENEMIES: VIOLENCE AND RECONCILIATION IN PERU (2012)).

13. See Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF*, 47 COLUM. HUM. RTS. L. REV. 204 (2016) [hereinafter, “Weizmann, *The End of Armed Conflict*”]; Bettina Scholdan, “*The End of Active Hostilities: The Obligation to Release Conflict Internees under International Law*,” 38 HOUSTON

research and analysis have not been fully heeded.¹⁴

PURPOSE OF THIS LEGAL BRIEFING

Where does international law give clear direction on when conflicts terminate? Where does it not? Why does it matter? And what could be done in this area to strengthen international law's claim to guide the behavior of warring parties and to protect affected populations? Answering these questions requires delving into the myriad (and often-inconsistent) provisions in treaty law, customary law, and relevant jurisprudence that purport to govern the end of war. Alongside the doctrinal analysis, an answer to these questions also begs a careful consideration of the changing concept of war and of what constitutes its end; evaluating diverse interests at stake in the continuation or close of conflict; and contextualizing the essentially political work of those who design the law. This Legal Briefing is dedicated to that examination. Our aims are to conduct a pioneering study of international law pertaining to the end of armed conflict and to provide a resource for scholars and practitioners.

STRUCTURE

The Legal Briefing is divided into seven sections, in addition to this Introduction and the Conclusion. **Section 2** is a primer on key legal concepts and fields. **Section**

J. INT'L L. 99 (2016) [hereinafter, "Scholdan, *The End of Active Hostilities*"]; Julia Grignon, *The Geneva Conventions and the End of Occupation*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015); Bruce Oswald, *End of Internment*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015) [hereinafter, "Oswald, *Internment*"]; Marco Sassòli, *Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015) [hereinafter, "Sassòli, *Prisoners of War*"]; Gabriella Venturini, *The Temporal Scope of Application of the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015) [hereinafter, "Venturini, *Temporal Scope*"]; Alice Debarre, *When Does War End?*, HUMANITY IN WAR, Dec. 17, 2015, <https://humanityinwarblog.com/2015/12/17/when-does-war-end/> <<https://perma.cc/VG9D-6VFW>>; JULIA GRIGNON, L'APPLICABILITÉ TEMPORELLE DU DROIT INTERNATIONAL HUMANITAIRE (2014) [hereinafter, "GRIGNON, L'APPLICABILITÉ TEMPORELLE"]; Marko Milanovic, *The end of application of international humanitarian law*, 96 INT'L REV. RED CROSS 163 (2014) [hereinafter, "Milanovic, *End of IHL Application*"]; Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143 (2014); Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 CARDOZO L. REV. 625 (2014); Rogier Bartels, *From Jus in Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?*, in JUS POST BELLUM (Carstehn Stahn, Jennifer S. Easterday, and Jens Iverson eds., 2014) [hereinafter, "Bartels, *When NIACs End*"]; Robert M. Chesney, *Postwar*, 5 HARV. NAT'L SEC. J. 305 (2014); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 34–61 (5th ed., 2012) [hereinafter, "DINSTEIN, WAR"]; Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, 94 INT'L REV. RED CROSS 133 (2012); VAIOS KOUTROULIS, LE DÉBUT ET LA FIN DE L'APPLICATION DU DROIT DE L'OCCUPATION (2010); ROBERT KOLB AND RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 99–106 (2008); Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373 (2006) [hereinafter, "Bell, *Peace Agreements*"]; Derek Jinks, "The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts," PROGRAM ON HUMANITARIAN POL. & CONF. RESEARCH, 2003, www.hpcrresearch.org/sites/default/files/publications/Session3.pdf <<https://perma.cc/T28W-MSWU>> [hereinafter, "Jinks, *The Temporal Scope*"].

14. See International Law Association, *Final Report on the Meaning of Armed Conflicts in International Law*, in WHAT IS WAR?: AN INVESTIGATION IN THE WAKE OF 9/11 363 (Mary Ellen O'Connell ed., 2012) [hereinafter, "ILA, *Meaning of Armed Conflicts*"].

3 highlights interests of diverse stakeholders. **Sections 4 and 5** outline international law concerning the end, respectively, of international armed conflicts and of non-international armed conflicts. **Section 6** sketches various scenarios that pose challenges to ending—and discerning the end—of conflict. **Section 7** explores such challenges, in particular, concerning the end of the U.S.’s War on Terror. **Section 8** puts forward four theories on when the most common form of armed conflict today—non-international armed conflicts—may come to an end. Finally, the **Conclusion** identifies concerns that international lawyers must address to strengthen international law’s claim to guide behavior in war.

CAVEATS

The bulk of the research was conducted primarily in English and thus generally does not comprehensively consider secondary sources in other languages. We do not make a claim to an exhaustive treatment of the innumerable international-law concerns regarding the end of armed conflict. To have been truly comprehensive, this study would have needed to be much, *much* longer and would have required research in many more languages.

2

PRIMER: KEY CONCEPTS

INTRODUCTION

Meant as a primer for those with relatively little background in international law concerning armed conflict, this section delineates key legal concepts and fields. We first outline the international-legal concept of armed conflict, including its general scope and sources. (Sections 4 and 5 provide more detailed discussion of the variants of that concept.) We then briefly address the relationship of the primary field of international law applicable in relation to armed conflict—variously termed international humanitarian law (IHL), the law of armed conflict (LOAC), and the *jus in bello*¹⁵—to certain other fields that may be relevant. Finally, we sketch the relationship between IHL and legal frameworks governing acts of terrorism.

THE CONCEPT OF ARMED CONFLICT IN INTERNATIONAL LAW

IHL is a branch of public international law that applies in relation to a situation of armed conflict or a state of war in the legal sense. Certain IHL treaties include provisions that contracting parties are required to undertake in “all circumstances”¹⁶—not only in “time of war”¹⁷ but also in “time of peace”¹⁸ and “peacetime.”¹⁹ The latter set includes such obligations as training armed forces in the law of war²⁰ and reviewing the legality of new weapons.²¹ Yet the bulk of the provisions govern behavior in relation to an existing armed conflict.

Scope

One way to conceive of the international-legal fabric of armed conflict is to see it as being formed by spinning four fibers into a continuous strand and stitching those threads together. The resulting fabric covers the armed conflict, setting the

15. See, e.g., the brief discussion in YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 13–14 (2d ed., 2004).

16. The general obligation is contained in Common Article 1 GCs I–IV.

17. Articles 44(2) and 47 GC I, 48 GC II, 127 GC III, and 144(1) GC IV.

18. Articles 23(1), 26(2), 44(1)–(2) and (4), and 47 GC I, 44 and 48 GC II, 127 GC III, 14 and 144 GC IV, and 66(7) and 83(1) AP I.

19. Articles 2(1) GCs I–IV, 6(1), 18(7), and 60(2) AP I.

20. Articles 47 GC I, 48 GC II, 127 GC III, 144 GC IV, and 83 AP I. Article 19 of AP II provides that “[t]his Protocol shall be disseminated as widely as possible.”

21. Article 36 AP I.

boundaries of the legal parameters. First, the *material scope* of application of IHL (also known as the scope of application *ratione materiae*) indicates what situations amount to an armed conflict under IHL. Second, the *personal scope* of application of IHL (also known as the scope of application *ratione personae*) designates who or what is bound by IHL, including what constitutes a party to the armed conflict under IHL, and who is protected under IHL. Third, the *geographic scope* of application of IHL (also known as the scope of application *ratione loci*) delimits where under IHL the armed conflict takes place and where else (if anywhere) IHL is applicable. And fourth, the *temporal scope* of application of IHL (also known as the scope of application *ratione temporis*) marks when IHL is applicable, including when the conflict begins and ends and when various rules and provisions of IHL are applicable or cease to be applicable. (Some of those rules might continue to apply even after the end of the armed conflict.²²)

IHL generally recognizes two categories of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). The contours of each category are addressed in more detail in, respectively, Section 4 (concerning IAC) and Section 5 (regarding NIAC).

IHL applies to all parties to an armed conflict. Those parties might include, for example, a state, a national liberation movement, dissident armed forces, or a non-state organized armed group.²³ In certain respects, IHL may also bind individuals.²⁴ Further, IHL—in the form of the law of neutrality—applies, where relevant, not only in relation to the parties but also to neutral states or states not party to the armed conflict.²⁵

Sources

There are two main sources of IHL: treaties and customary law.²⁶ General principles may also be relevant. In general terms, treaties are international agreements between two or more states.²⁷ The Statute of the International Court of Justice (ICJ) defines customary law as “international custom, as evidence of a general practice accepted as law.”²⁸

As outlined in more detail in Sections 4 and 5, there is considerable fragmentation in the contemporary *lex scripta* (written or codified law) concerning the end of armed conflict under IHL. That fragmentation arises in part because:

- Various IHL treaties lay down different formulations—and certain IHL instruments contain different formulations *within* a single instrument—concerning relevant duties, rights, authorities, and protections that arise

22. See, e.g., *infra* Section 5 (Articles 2 and 25 AP II).

23. See *infra* Sections 4 and 5.

24. See Jann K. Kleffner, *Scope of Application of International Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 53–56 (Dieter Fleck ed., 3d ed., 2013).

25. *Id.* at 49.

26. On the construct of “strata,” rather than “sources,” of international law, see Yoram Dinstein, *The Interaction between Customary International Law and Treaties*, 322 *RECUEIL DES COURS* 260–1 (2006).

27. See, e.g., Article 2(1)(a) Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 133 [hereinafter, “VCLT”]; Restatement (Third) of the Foreign Relations Law of the United States § 301(1) (1987).

28. Article 38(1)(b) Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153.

before, at the moment of, or after the termination of the armed conflict;

- Not all states have contracted into the same sets of IHL treaties; and
- Not all end-of-armed-conflict IHL treaty provisions apply, at least as a matter of treaty law, to all IACs and NIACs, or even to all IACs or to all NIACs.

In principle, customary IHL could help resolve that fragmentation and fill in the corresponding gaps in the *lex scripta*. Therefore, for at least three reasons, discerning the scope of applicable customary IHL may be especially important concerning the end of a particular armed conflict and the end of applicability of IHL in relation to that conflict.

First, in principle, customary IHL could bind parties to rules and principles even if those protections had not been codified in treaties. This type of customary-IHL formation might be most salient with respect to the end of armed conflict in terms of formulations, standards, and concepts that states have not (yet) inked in international agreements but that have emerged in other contexts, especially international tribunals.

Second, in principle, customary IHL could fill gaps in the *lex scripta* between contracting parties to treaties that contain certain end-of-armed-conflict provisions and states that have not contracted into those treaties. In this way, customary IHL has the potential to help address the lack of universal ratification of key IHL treaties, especially Additional Protocol I to the Geneva Conventions of 1949 (AP I) and Additional Protocol II to those Conventions (AP II).

Third, in principle, customary IHL can help fill gaps in the *lex scripta* between end-of-armed-conflict-related provisions concerning IAC and those concerning NIAC. In that respect, customary IHL might be particularly salient considering the much denser and more extensive cluster of such provisions laid down in treaties regulating IAC compared to the sparser set of such provisions established in treaties regulating NIAC.

As illustrated in Sections 4 and 5, however, it is far from clear whether customary IHL does in practice help resolve these forms of fragmentation and fill in the corresponding gaps in the *lex scripta* with respect to the end of armed conflict. As we shall show, the fact that some treaties contain different tests—at times, even within the same instrument—concerning the end of conflict poses a significant challenge for clear and decisive customary norms to emerge.

RELATIONSHIPS BETWEEN FIELDS OF INTERNATIONAL LAW CONCERNING ARMED CONFLICT

Jus ad Bellum

Today, the applicability of IHL to an armed conflict is generally not predicated on the lawfulness of the resort to the use of force in international relations, which is governed by a different field of public international law: the *jus ad bellum* (or, as some commentators term it, the *jus contra bellum*).²⁹ Nonetheless, at least one possible intersection between IHL and the *jus ad bellum* may be relevant to the

29. See, e.g., Hans-Peter Gasser and Daniel Thürer, *International Humanitarian Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (2011).

end of armed conflict. That intersection concerns whether rounds of hostilities between the belligerent parties fall within the ambit of the same war. If not—that is, if one war between the belligerent parties has terminated and another war between them has begun—the new war must be analyzed on its own merits with respect to the assessment of aggression (or armed attack) and self-defense under the *jus ad bellum*.³⁰

International Human Rights Law³¹

While IHL traces its roots to the regulation of interstate wars, international human rights law (IHRL), in its contemporary form, arose out of an attempt to regulate, as a matter of international law and policy, the relationship between the state—through its governmental authority—and its population. Unlike the relatively narrow war-related field of IHL, IHRL spans an ever-growing range of dealings an individual, community, or nation may have with the state.

In recent decades, the connection between IHL and IHRL has been the subject of a growing interest by states, adjudicatory bodies, and international institutions. The precise links between these two branches of public international law have also merited extensive academic commentary. The debate over this relationship largely centers on three issues. The first issue is whether IHRL applies extraterritorially such that states bring all, some, or none of their IHRL obligations with them when they engage in armed conflicts (as defined in IHL) outside of their territories. The second issue is whether non-state actors (especially organized armed groups) have *de jure* IHRL obligations (or, at least, *de facto* IHRL-related responsibilities). And the third issue is what is the apposite interpretive procedure or principle to use when ascertaining the content of a particular right or obligation under the relevant framework(s). This last point is especially pertinent where the two bodies of law—IHL and IHRL—are thought to apply simultaneously.

With respect to international law concerning the end of armed conflict, IHRL may be relevant in at least two major respects. First, where IHL is considered to supersede or replace an IHRL-based right or obligation, it is important to ascertain the temporal scope of application of IHL because, as noted above, IHL tolerates certain measures—including lethal targeting in direct attack against military objectives—that would usually contravene IHRL.

The second respect in which IHRL may be relevant here concerns situations where an armed conflict transforms from being international in character to non-international in character (thus, the “old” IAC ends and a “new” NIAC begins) and where the originally intervening foreign state remains to fight a non-state organized armed group (or groups) alongside the host state as part of the “new” NIAC. (Many

30. See Yoram Dinstein, *Armistice*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 15 (2015) [hereinafter, “Dinstein, *Armistice*”]. For a discussion of two possibly-relevant examples, see *infra* Section 6. See, more generally, Yoram Dinstein, *Aggression*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015); Karl Zemanek, *Armed Attack*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013); Christopher Greenwood, *Self-Defence*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011).

31. See, e.g., Andrew Clapham, *The Complex Relationship Between the Geneva Conventions and International Human Rights Law*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

commentators consider the U.S. position in relation to Afghanistan, in the October 2001–present period, to constitute such an example.³²) In such scenarios, discerning the existence, content, and extent of applicable IHL obligations of the foreign state may be particularly salient. That is because, once the conflict transforms from an IAC into a NIAC, in general the relatively-thicker set of IHL-of-IAC provisions terminate as the less-dense set of IHL-of-NIAC provisions are triggered. Thus, upon the end of the “old” IAC and the beginning of the “new” NIAC, it may be important to determine whether and to what extent IHL may complement the relatively fewer IHL-of-NIAC provisions.

International Criminal Law³³

Though international criminal law is not an altogether new branch of international law, its post-WWII evolution is often considered one of the great developments of modern international law. In general, ICL imposes individual responsibility—not state responsibility—for international crimes, such as war crimes, crimes against humanity, and genocide. The sources of ICL may be found in treaties, customary international law, and general principles, as well as the relevant jurisprudence of courts. In practical terms, ICL may be applied by domestic courts (some reaching, under universal-jurisdiction principles, beyond their nationals or borders); by dedicated international tribunals (such as the International Criminal Court (ICC)); or by a range of hybrid courts that merge domestic and international components.

ICL may implicate the end of armed conflict primarily in terms of the temporal jurisdiction concerning war crimes. A war crime may be committed only where there is a sufficient connection with an armed conflict.³⁴ Thus, to establish whether a war crime may have been committed, it is necessary to ascertain the temporal scope of the armed conflict.

RELATIONSHIP BETWEEN IHL AND LEGAL FRAMEWORKS GOVERNING ACTS OF TERRORISM

Terrorist acts and other forms of involvement by terrorists in armed conflict may

32. See Françoise J. Hampson, *Afghanistan 2001–2010*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* (Elizabeth Wilmshurst ed., 2012) [hereinafter, “Hampson, *Afghanistan*”]; see generally Tristan Ferraro, *The ICRC’s legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict*, 97 INT’L REV. RED CROSS 1227 (2015) [hereinafter, “Ferraro, *Foreign Intervention*”].

33. See, e.g., Paola Gaeta, *The Interplay Between the Geneva Conventions and International Criminal Law*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

34. See, e.g., Alexander Schwarz, *War Crimes*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* ¶ 1 (2014) (defining a war crime *stricto sensu* as “any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and [that] has been criminalized by international treaty or customary law” and explaining that “[t]his definition requires at least two conditions qualifying a conduct to a war crime. First, a violation of international humanitarian law, and second, the criminalization of the conduct under treaty or customary international law. The applicability of the rules of international humanitarian law implies that a war crime must be satisfactorily connected to an armed conflict. The second condition requires that customary or international treaty law must provide legal norms entailing individual criminal responsibility for the perpetration of such a violation”) (internal cross-references and citation omitted).

arise in relation to either category of armed conflict—IAC or NIAC. (Certain anti-terrorism treaties exclude from their scope of application the conduct of armed forces in an armed conflict.³⁵) Of course, terrorist acts may also be conducted outside of the context of an armed conflict; those acts of terrorism are subject to applicable domestic law-enforcement regimes and IHRL, but not (also) IHL.³⁶

The only terrorist acts that IHL applies to are those that have a sufficient connection with an armed conflict. In other words, “not all acts of terrorism in a territory affected by armed conflict will comprise part of that conflict.”³⁷ Instead, “[i]t remains necessary to distinguish ordinary criminal acts of terrorism committed by other individuals or organisations from violence committed by the parties to the conflict or which has a ‘nexus’ to the conflict.”³⁸ The response to the former—an “ordinary” criminal act of terrorism—is not governed by IHL. Rather, it is subject to the application of domestic law-enforcement measures compatible with other relevant fields of international law, such as IHRL.³⁹

So long as they are conducted with a sufficient nexus to an armed conflict, many terrorist acts—such as attacks directed against civilians who have not forfeited protection under IHL⁴⁰—would also constitute a violation of IHL.⁴¹ Yet a number of the acts that may be penalized in domestic law as terrorism offenses are not prohibited under IHL. (Nor, however, are those acts necessarily authorized

35. *E.g.*, Article 19(2) International Convention for the Suppression of Terrorist Bombings, 2149 U.N.T.S. 256 (providing that “[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention”); Article 26(5) Convention on the Prevention of Terrorism, Council of Europe, Treaty Series No. 196, 2005.

36. Those acts may (also) fall within the scope of an international anti-terrorism convention.

37. Ben Saul, “Terrorism and international humanitarian law,” in *RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM* 214 (ed. Saul, 2014) [hereinafter, “Saul, *Terrorism and IHL*”].

38. *Id.* See also *Boškoski*, Trial Judgement, *supra* note 4, at ¶ 190 (considering “that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this [terrorist] type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict”).

39. See Saul, *Terrorism and IHL*, *supra* note 37, at 214.

40. See *id.* at pp. 225–26.

41. For example, pursuant to Article 51(2) of AP I, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited,” and, according to Article 4(2) (d) of AP II,

[w]ithout prejudice to the generality of the foregoing, the following acts against [all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted] are and shall remain prohibited at any time and in any place whatsoever: [...] acts of terrorism.

See *Prosecutor v. Stanislav Galić*, Judgement, ICTY Appeals Chamber, IT-98-29-A, Nov. 30, 2006, ¶ 90 (finding that “the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties”). See also Hans Gasser, *Acts of terror, “terrorism” and international humanitarian law*, 84 INT’L REV. RED CROSS 547, 554–62 (2002); YORAM DINSTEIN, *NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW* 34 (2014) [hereinafter, “DINSTEIN, NIACS IN INTERNATIONAL LAW”].

under IHL.⁴²) For instance, IHL does not expressly prohibit the provision of financial resources to non-state organized armed groups, even where the latter are committing acts of terrorism. Nonetheless, domestic laws, certain non-IHL treaties, and United Nations Security Council decisions penalize various forms of financial and other support to terrorist acts. And international-legal rules on aiding and abetting the commission of certain crimes or internationally wrongful acts may penalize various forms of support to terrorist groups.⁴³ Moreover, so long as they comport with law-of-armed-conflict rules governing the conduct of hostilities, attacks carried out by a non-state organized armed group against government armed forces are not prohibited in IHL. Yet, in accordance with applicable IHRL, domestic legislation may penalize those attacks as violent crimes, treason, support for terrorism, and the like.⁴⁴

42. For instance, under Article 3(1) of AP II, “[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.”

43. See, e.g., Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, CHATHAM HOUSE, Nov. 2016, <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> <<https://perma.cc/MKB3-R4D5>>.

44. See, e.g., *R v. Mohammed Gul* [2012] EWCA Crim 280 [60] (concluding that “[t]hose who attacked the military forces of a government or the Coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act”); see also U.S. DEP’T OF DEF., *LAW OF WAR MANUAL* § 17.4.1.1 (Dec. 2016) [hereinafter, “*LAW OF WAR MANUAL*”] (stating that “[a]n important consequence of the fact that States may exercise sovereignty over persons belonging to a non-State armed group is that a State may prosecute individuals for participating in hostilities against it. Such conduct frequently constitutes crimes under ordinary criminal law (e.g., murder, assault, illegal destruction of property). [¶] Although, during international armed conflict, lawful combatants are afforded certain immunities from the enemy State’s jurisdiction, persons belonging to non-State armed groups lack any legal privilege or immunity from prosecution by a State that is engaged in hostilities against that group”).

3

DIVERSE STAKES AND STAKEHOLDERS

INTRODUCTION

Read through an international-law lens, perhaps the most significant stakes in whether an armed conflict continues to exist or has ended concern the international-legal parameters pertaining to:

- Starving, detaining, and killing an enemy;
- Incidentally killing civilians who are not directly participating in hostilities;
- Destroying an adversary's property and damaging the natural environment;
- Occupying foreign lands;
- Protecting individual civilians and the civilian population; and
- Allowing access for humanitarian organizations.

Many other legal stakes might arise as well, as might myriad moral, social, economic, and political concerns.

Political leaders, military commanders and forces, civilian populations, prosecutors, and humanitarians might each have their own interests in the continuation—or the end—of a conflict and in the corresponding continuation—or termination—of the application of the international-legal framework of armed conflict.⁴⁵ At times those interests may overlap. But at other times they may diverge, sometimes significantly.

STAKEHOLDERS

Political Leaders

Political leaders may have a mixed set of incentives concerning the continued existence or end of an armed conflict. For instance, on one hand, adopting an IHL framework may allow political leaders to fight with greater powers and resources, because the recognition of an armed conflict may make the invocation of emergency

45. See Milanovic, *End of IHL Application*, *supra* note 13, at 165 (explaining that the analysis by an actor of when IHL ceases to apply may be affected “by whether that actor ultimately *wants* IHL to continue applying, in light of the consequences of continuation or termination”) (emphasis original).

authorities more palatable to domestic constituencies. Yet, on the other hand, political leaders might shy away from recognizing that an armed conflict exists, because doing so might, for example, be interpreted as conferring legitimacy on the adverse party.

Armed Forces

The clarity and discernibility of the scope and applicability of international law pertaining to armed conflict might implicate members of the armed forces in significant ways. Indeed, the content of the international-legal parameters pertaining to armed forces—whether those rules are conceived as guiding, empowering, constraining, or protecting them—might turn directly on the existence (or not) of an armed conflict.

Perhaps most importantly in this context, in general, the conduct-of-hostilities rules under IHL permit—or, at least, tolerate—more lawful death and destruction compared to the rules governing the use of lethal force against persons under IHRL or domestic law-enforcement frameworks.⁴⁶ In addition, certain other measures that armed forces might take in attempting to secure victory—such as capturing and detaining enemy forces, seizing or destroying property, and controlling territory and populations—might be lawful in war but not at any other time. In these senses, the longer the armed conflict continues, the longer the armed forces may have access to extraordinary legal provisions.

Discerning a fighter's status under international law might also be important with respect to conferring on that fighter prisoner-of-war (POW) status upon capture, as well as to the operation of the so-called "belligerent's privilege." Pursuant to the latter, under IHL qualifying combatants "cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime."⁴⁷ (Both POW status and the belligerent's privilege are formulated under IHL treaty provisions only in relation to IACs, not in relation to NIACs.) Moreover, with few exceptions (such as with respect to riot control agents⁴⁸), armed forces may use a broader array of weapons in armed conflict than in other situations.⁴⁹

Despite the high stakes for armed forces in ascertaining the existence of an armed conflict, in certain circumstances, the moment when armed violence qualifies—or ceases to qualify—as an armed conflict under international law may be discernible only after the fact.⁵⁰ In the meantime, uncertainty as to the applicable law may prevail, including for armed forces.

46. See generally ICRC, *USE OF FORCE*, *supra* note 3.

47. Knut Dörmann, *The legal situation of 'unlawful/unprivileged combatants'*, 85 INT'L REV. RED CROSS 45 (2003).

48. Article I(5) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317 (providing that "[e]ach State Party undertakes not to use riot control agents as a method of warfare").

49. For these and other reasons, it might also be vital for peacekeepers and troops involved in peace-enforcement operations to know whether IHL applies in relation to their conduct. See Venturini, *Temporal Scope*, *supra* note 13, at 62–63.

50. On the international-legal criteria concerning the existence of international armed conflicts, see *infra* Section 4; on the international-legal criteria concerning the existence of non-international armed conflicts, see *infra* Section 5.

Individual Civilians and Civilian Populations

Individual civilians and civilian populations may also have a strong interest in ascertaining when an armed conflict begins and ends. In general, compared to IHRL and domestic law-enforcement regimes regulating peacetime measures, IHL is more tolerant of “incidental” civilian death and destruction of civilian objects, including private property.⁵¹ IHL treaties regulating IACs lay down provisions concerning internment of nationals of the enemy state and seizure of the property of such nationals—and those provisions cease to be applicable upon the termination of the relevant conflict.⁵² Once peace is made in relation to a belligerent occupation, seized private “munitions de guerre” and certain related items must be restored and compensation provided.⁵³ Determining when active hostilities have ceased may also have important consequences for measures to protect civilians from minefields, mines, and booby-traps, as well as from explosive remnants of war.⁵⁴

As a practical matter, once the armed conflict has terminated it will often be easier to take steps to bring legal claims for violations and losses related to the conflict to domestic, international, or hybrid tribunals, bodies, commissions, or courts. The existence of a state of war may further affect myriad domestic laws about, for instance, compensation, insurance, frustrations of contracts, and trade restrictions.⁵⁵

Somewhat paradoxically, the civilian population or individual members of it may, depending on the circumstances, prefer to argue *in favor* of extending the application of relevant IHL provisions. Unlike IHRL, IHL clearly binds all parties to an armed conflict, including states and, where relevant, organized non-state armed groups. Moreover, some IHL rules—such as the treaty provisions prohibiting punishment of medical care, irrespective of who benefits from it—might be more protective than analogues established in IHRL or domestic law.⁵⁶ In addition, several IHL provisions, especially those pertaining to occupied territories, impose positive obligations on the enemy power to address—or, if unable to do so on its own, to allow others to address—the humanitarian needs of the local population.⁵⁷

Neutral States and States Not Party to an Armed Conflict

Neutral states and states not party to an armed conflict may have interests in discerning the end of an armed conflict to which the law of neutrality applies.⁵⁸

51. See, e.g., Pejic, *Use of Force*, *supra* note 3.

52. See *infra* Section 4.

53. *Id.*

54. See *infra* Sections 4 and 5.

55. See, e.g., Niels Petersen, *Armed Conflict, Effects on Contracts*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015).

56. See generally Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, HARV. L. SCH. PROGRAM ON INT’L L. & ARMED CONFLICT (HLS PILAC), Sept. 2015, <https://pilac.law.harvard.edu/mcac>.

57. See, e.g., Articles 55–56, 59–60 GC IV; see generally DAPO AKANDE AND EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT (2016), <https://docs.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf> <<https://perma.cc/8VTF-FDU4>>.

58. Though some of the rules of the law of neutrality are not entirely well settled, the adoption of the

That is because, in general, the rights and duties imposed on those states pursuant to the law of neutrality are extinguished once the armed conflict ends.

The rights and duties of neutral states under the law of neutrality concern a broad set of powers, authorities, and obligations. Consider but two examples. First, a “neutral state is bound to use all means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to be engaged in acts of war against the party to a conflict.”⁵⁹ And second, “[n]eutral states must intern forces of the parties to the conflict trespassing on neutral territory.”⁶⁰

Asylum Seekers

In certain contexts, the existence of an armed conflict may have implications with respect to asylum or another similar status. EU Directive 2011/95/EU provides one example. That Directive sets out guidance on international protection for refugees or persons eligible for “subsidiary protection.”⁶¹ Article 2(f) of the Directive establishes that a person eligible for such “subsidiary protection” may include certain third-country nationals or stateless persons who do not qualify for refugee status but who are facing, in certain scenarios, a real risk of “suffering serious harm.” In turn, Article 15(c) of the Directive establishes that such “serious harm” may consist of “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

Arms-Transferring States

A provision of the Arms Trade Treaty of 2013 (ATT)⁶² may impliedly impose an obligation on states parties to that instrument to discern the beginning and end of a relevant armed conflict. In particular, Article 6(3) of the ATT prohibits a state party from authorizing a transfer of conventional arms or certain other items if the party “has knowledge at the time of authorization that the arms or items would be used in the commission of ... grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.” The commission of each of these sets of acts may occur only in relation to an armed conflict.

United Nations Charter did not abolish the principles underlying the law of neutrality. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 260–61. See also, e.g., Michael Bothe, *The Law of Neutrality*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1106 (Dieter Fleck ed., 3d ed., 2013) [hereinafter “Bothe, *The Law of Neutrality*”]; Michael Bothe, *Neutrality, Concept and General Rules*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (2015) [hereinafter, “Bothe, *Concept and Rules*”]; J. Ashley Roach, *Neutrality in Naval Warfare*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (2015).

59. Bothe, *The Law of Neutrality*, *supra* note 58, at 567 (citation omitted).

60. *Id.* at 565 (citations omitted).

61. Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), in: Official Journal L 337/9, 20/12/2011, pp. 9–26, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF> <<https://perma.cc/X2ZE-MXKL>>.

62. Arms Trade Treaty, Apr. 2, 2013, U.N. Doc. A/RES/67/234 B.

War-Crimes Courts

To establish war-crimes jurisdiction, a court—whether at the domestic or the international level—must ascertain when the relevant armed conflict began and when it has ended.⁶³ That is because a war crime, strictly speaking, may be committed only in connection with an armed conflict.⁶⁴

International crimes other than war crimes, such as genocide and crimes against humanity, are typically defined in international treaties and in international customary law such that they need not be committed (though they often are *in fact* committed) in connection with an armed conflict. While there is significant overlap in the conduct that is proscribed under the Statute of the ICC as crimes against humanity and as war crimes, some forms of conduct may form the basis for a war-crimes prosecution but not for a crimes-against-humanity prosecution (or vice versa). One example is the war crime of declaring that no quarter will be given—that is, declaring that there shall be no survivors.⁶⁵ Under the ICC’s Statute, that war crime has no direct crimes-against-humanity analogue. Thus, a state may prefer not to explicitly recognize the existence of an armed conflict to which IHL applies because recognizing the conflict might make it practically (if not necessarily legally⁶⁶) easier for the ICC—or for states with universal-jurisdiction regimes mirroring the relevant parts of the jurisdiction of the ICC—to establish jurisdiction in order to prosecute the state’s armed forces for war crimes even if not for crimes against humanity.

With respect to a war-crimes prosecution, the diverse implicated actors might each have diverging or converging interests in either shrinking or expanding the temporal period of the relevant armed conflict. Consider the different institutional or personal interests of prosecutors; judges; the accused and her defense lawyers; witnesses; survivor-victims and their families; the affected local population; and international society more broadly. For their part, judges presiding over war-crimes courts may have an institutional interest in establishing a continuous, extensive period of armed conflict.

An ICTY Trial Chamber held that, once IHL “has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability

63. Unless the relevant armed conflict has not terminated. For example, in establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), the U.N. Security Council reserved to itself the power to determine the end-point of the tribunal’s temporal jurisdiction. U.N. Security Council, Res. 827 (1993), ¶ 2 (“*Decides* hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia *between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace*”) (emphasis added).

64. See *supra* note 34.

65. Articles 8(2)(b)(xii) and (e)(x) Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter, “ICC Statute”]. Pursuant to Article 8(1) of the ICC’s Statute, “[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

66. As explained in Sections 4 and 5, contemporary international-legal concepts of armed conflict—whether of an international or non-international character—are rooted in relatively objective, fact-based criteria, with the possible limited exception of the state-of-war doctrine.

and non-applicability, leading to a considerable degree of legal uncertainty and confusion.”⁶⁷ That legal certainty may make it easier to determine the applicable rules and for the Court to establish, perhaps, an uninterrupted period of war-crimes jurisdiction. Yet that certainty might also come at a cost—not least of presuming the applicability of relatively more permissive IHL rules instead of more restrictive provisions established in other international-legal frameworks (especially IHRL) and domestic regimes.⁶⁸

Human-Rights Bodies

IHRL courts and other bodies may also have interests in ascertaining the beginning and end of a relevant armed conflict. (Unlike war-crimes courts, IHRL bodies

67. Prosecutor v. Ante Gotovina *et al.*, Judgement, ICTY Trial Chamber I, IT-06-90-T, Apr. 15, 2011, ¶ 1694 [hereinafter, “Gotovina, Trial Judgement”]. In adopting this approach, the Trial Chamber was addressing an international armed conflict. Nonetheless, the underlying concern—of a “revolving door between [IHL] applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion”—would also seem to arise in relation to a non-international armed conflict.

68. See, e.g., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶¶ 389–90 (2d ed., 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> <<https://perma.cc/9P53-DP5Y>> [hereinafter, “GC I 2016 COMMENTARY”] (stating that, “[w]hile common Article 3 [of the 1949 Geneva Conventions] contains rules that serve to limit or prohibit harm in non-international armed conflict, it does not in itself provide rules governing the conduct of hostilities. However, when common Article 3 is applicable, it is understood that other rules of humanitarian law of non-international armed conflict, including those regarding the conduct of hostilities, also apply. Thus, ... it is important that the rules applicable in armed conflicts apply only in the situations for which they were created. [¶] The existence of a situation that has crossed the threshold of an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’ must therefore be neither lightly asserted nor denied”) (internal references omitted). Originally, this ICRC *Commentary* was published online; subsequently, a print version was published. All citations in this Legal Briefing to GC I 2016 COMMENTARY are to the online version. The ICRC’s original *Commentaries* on GCs I–IV were published between 1952 and 1960. INT’L COMM. OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf <<https://perma.cc/CXJ4-H9QF>> [hereinafter, “GC I 1952 COMMENTARY”]; INT’L COMM. OF THE RED CROSS, COMMENTARY: II GENEVA CONVENTION RELATIVE TO THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA (Jean S. Pictet ed., A. P. de Heney trans., 1960), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-II.pdf <<https://perma.cc/MJ27-85KL>> [hereinafter, “GC II 1960 COMMENTARY”]; INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., A. P. de Heney trans., 1960), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf <<https://perma.cc/7Z6S-Y6PG>> [hereinafter, “GC III 1960 COMMENTARY”]; INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIANS PERSONS IN TIME OF WAR (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf <<https://perma.cc/325E-ZJZ5>> [hereinafter, “GC IV 1958 COMMENTARY”]. The ICRC published a *Commentary* on AP I and AP II in 1987. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman eds., 1987), http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf <<https://perma.cc/LK4X-LXZ4>> [hereinafter, “COMMENTARY ON THE APs”]. In March 2016, the ICRC published an updated version of its *Commentary* on GC I. See GC I 2016 COMMENTARY, *supra* this note. The ICRC plans also to publish updated *Commentaries* on GCs II–IV and APs I–II over the coming years. See Jean-Marie Henckaerts, *Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the twenty-first century*, 94 INT’L REV. RED CROSS 1551 (2012).

generally address state responsibility, not individual personal responsibility for international crimes.) The basic reason is that IHL might be implicated in relation to a situation where an alleged IHRL violation has a nexus with an armed conflict. In such contexts, identifying the source and content of the applicable legal norm underlying the alleged IHRL violation—as well as the party obliged to fulfill the corresponding obligation—might entail considering not only IHRL but perhaps also IHL.

A fundamental issue concerns the competence of the relevant body: in short, may it adjudicate whether acts and norms falling within its purview are compatible only with relevant IHRL or (also) with IHL? Various international human-rights bodies have taken different approaches to this concern. The Inter-American Commission of Human Rights seems to have adopted, in 1997, one of the most deliberate and direct approaches to ascertaining specific IHL violations in a proceeding of an international-human-rights body.⁶⁹ In general, however, international-human-rights bodies have not adopted such a direct approach. Yet there seems to be a trajectory, in both the Inter-American Court of Human Rights and the European Court of Human Rights, at least not to exclude the possibility of considering IHL in interpreting relevant provisions of their respective constitutive instruments.

State-Responsibility Compensation Mechanisms

Two recent examples demonstrate that delimiting the temporal period—including the end—of armed conflict may be relevant for assessing state responsibility in relation to compensation claims.⁷⁰ First, as part of the process of awarding tens of billions of dollars in compensation for losses and damages suffered as a result of Iraq's invasion and occupation of Kuwait, including certain IHL violations, the United Nations Compensation Commission specified the period between Iraq's invasion of Kuwait and the ceasefire.⁷¹ And second, in adjudicating claims and awarding compensation for damage incurred due to ascertained violations of IHL, the Eritrea-Ethiopia Claims Commission established the temporal framework between the outbreak of hostilities and the termination of armed conflict between Eritrea and Ethiopia.⁷²

Humanitarian Actors

Humanitarian actors may also have interests in detecting whether an armed conflict has ended such that IHL no longer applies in relation to the situation. To

69. In particular, in a report concerning an attack on a military base in Argentina, the Commission assessed violations not only of the American Convention on Human Rights but also of Common Article 3 of the Geneva Conventions of 1949. *Abella v. Argentina (La Tablada)*, Case 11.137, Inter-Am.Cm.H.R., Report No 55/97, ¶ 164 (1997) [hereinafter, "*La Tablada*"]. *But compare id.* at ¶ 164 (holding that when the ACHR and IHL instruments both apply, Article 29(b) of the American Convention on Human Rights requires the Commission to "take due note of and, where appropriate, give legal effect to applicable humanitarian law rules") with *Las Palmeras v. Colombia*, Preliminary Objections, Judgment, 2000 Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000), ¶ 33 (holding that the American Convention on Human Rights "has only given the Court competence to determine whether the acts or the norms of the State are compatible with the convention itself, and not with the 1949 Geneva Conventions").

70. For an overview of compensation for personal damages in relation to World War II, see Rainer Hofmann, *Compensation for Personal Damages Suffered during World War II*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013).

71. See Venturini, *Temporal Scope*, *supra* note 13, at 64 (citations omitted).

72. *Id.* (citations omitted).

access civilian populations in need, persons involved in principled humanitarian action—often defined in relation to the principles of humanity, impartiality, independence, and neutrality⁷³—typically have a much stronger set of claims based in IHL than in IHRL or domestic law. Broadly speaking, in a situation of armed conflict, humanitarian actors may offer their services in accordance with IHL, which contains rules on humanitarian assistance and access to civilian populations affected by armed conflicts.⁷⁴ In occupied territories, in general, if all or part of the population is inadequately supplied, there is an obligation of the Occupying Power either to ensure adequate supplies to the population or to agree to and facilitate relief actions.⁷⁵ In relation to situations of armed conflict, certain IHL treaty provisions prohibit punishment of humanitarian and other actors who carry out ethically sound medical care, irrespective of who benefits from that care, including wounded and sick enemy fighters *hors de combat* (out of the fight).⁷⁶ With respect to accountability, under at least the ICC’s Statute it is a war crime in an armed conflict—whether of an international or non-international character—to intentionally direct attacks against a humanitarian assistance mission.⁷⁷ Finally, the mandate of some humanitarian organizations, such as the International Committee of the Red Cross (ICRC), are broader in times of conflict than in times of peace.⁷⁸

73. For a brief overview, see Phoebe Wynn-Pope, Yvette Zegenhagen, and Fauve Kurnadi, *Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation*, 97 INT’L REV. RED CROSS 235, 239–41 (2016).

74. See, e.g., Felix Schwendimann, *The legal framework of humanitarian access in armed conflict*, 93 INT’L REV. RED CROSS 993, 997 (2011) (citing to Articles 3(2) GCs I–IV, 10 and 59(2) GC IV, 70(1) AP I, and 18(1) and (2) AP II).

75. *Id.* at 1001–02.

76. Articles 18(3) GC I, 16(1) AP I, and 10(1) AP II.

77. Articles 8(2)(b)(iii) and 8(2)(e)(iii) ICC Statute, in particular against personnel, installations, material, units, or vehicles involved in such a mission, so long as the mission is in accordance with the Charter of the United Nations and so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

78. See Int’l Comm. Red Cross, *The ICRC’s mandate and mission*, Oct. 29, 2010, <https://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm> <<https://perma.cc/E4B2-TB58>>.

4

OVERVIEW: INTERNATIONAL HUMANITARIAN LAW PROVISIONS CONCERNING THE END OF INTERNATIONAL ARMED CONFLICT

INTRODUCTION

This section outlines IHL provisions concerning the end of international armed conflicts (IACs) and the cessation of (a portion of) IHL in relation to those conflicts. (Section 5 addresses non-international armed conflicts.) To lay the groundwork, we first sketch the international-legal concept of IACs. We discuss some salient issues concerning agreements between the parties, such as cease-fires and peace treaties. The bulk of the section identifies, in outline form, IHL treaty provisions concerning the end of IACs and the cessation of application of IHL in relation to those conflicts. And we briefly highlight the most-cited general formulation by a judicial body on what marks the end of IAC. Finally, a table summarizes relevant IHL-of-IAC treaty provisions and a few salient formulations drawn from international bodies.

CONCEPT OF INTERNATIONAL ARMED CONFLICT⁷⁹

The history of the contemporary international-legal concept of international armed conflicts spans many centuries. Painting the boundaries, if only in broad-brush strokes, of that concept is important here because it is not possible to determine when an IAC ends, under current IHL, without establishing the scope of the relevant conflict. Today, three types of armed conflicts between two or more states may be relevant: a *state of war* in the legal sense, an *international armed conflict*, or a *belligerent occupation*. Each of these concepts may entail different implications with respect to discerning when the relevant conflict has ceased and when (a portion of) IHL no longer applies in relation to it.

79. See, e.g., Andrew Clapham, *The Concept of International Armed Conflict*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

Over many centuries, the international-legal concept of war between two or more states as well as related concepts—such as neutrality, measures short of war, and reprisals—underwent significant changes. In contemporary terms, those concepts variously implicated the *jus ad bellum*, IHL, or both of those fields (in addition to others). Some key parts of that history, in the form of an extremely general outline, included the following shifts (in chronological order, from old to new):

- From the Just War doctrine, in which the resort to force was largely framed in terms of vindicating natural-law rights;
- To the legal institution of war, in which war, as a legal condition, was regulated as an acknowledged element of international society;
- To the general outlawry of the policy of resorting to war to resolve disputes in international relations;
- To the rise, after World War II, of the concept of international armed conflict and of the general prohibition on the “use of force” in international relations with two main exceptions (pursuant to a U.N. Security Council mandate or to self-defense in the case of an “armed attack”).

At certain points in this chronology, war was conceptualized as the exception and peace the norm; at certain other points, war was considered an institution of international law.⁸⁰

From a legal perspective, perhaps the most useful starting point to sketch the contemporary concept of IAC is the adoption of the four Geneva Conventions of 1949 (GCs I–IV). Those treaties expressly provide, with respect to their scope of application *rationae materiae* (in other words, what constitutes the subject matter of an international armed conflict to which those Conventions apply), that:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁸¹

In short, the key concepts are *a declared war*; *any other armed conflict between two or more states*; and *a total or partial occupation*. Each of those legal concepts may raise different considerations with respect to ascertaining the termination of the relevant type of IAC and the cessation of the applicability of (a portion of) IHL to that conflict.

State of War

Because we are concerned here primarily with the end of armed conflict, we will not address whether, as a matter of contemporary international law, a state may lawfully resort to or otherwise seek to establish a state of war in the legal

80. See generally STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* (2005) [hereinafter, “NEFF, WAR”].

81. Article 2(1)–(2) GCs I–IV.

sense.⁸² With respect to the scope of application *rationae materiae*, states have incorporated the concept of a “declared war” and a “state of war” into the Geneva Conventions of 1949⁸³ and—through incorporating by reference the relevant article in those Conventions—into certain other subsequent treaties that regulate IAC.⁸⁴ Moreover, recognitions, whether implicit or explicit, of the existence of a state of war—or, at least, ostensible declarations of war—have occurred since the adoption of the U.N. Charter.⁸⁵

82. See, e.g., *Dalmia Cement Ltd. v. National Bank of Pakistan* (1976), 67 I.L.R. 611; Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT’L & COMP. L. Q. 283 (1986); LORD McNAIR AND A. D. WATTS, LEGAL EFFECTS OF WAR 2–6 (1966) [hereinafter, “MCNAIR AND WATTS, LEGAL EFFECTS”]; ILA, *Meaning of Armed Conflicts*, *supra* note 14, at 341; Dino Kritsiotis, *Topographies of Force*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES (M. N. Schmitt and J. Pejic eds., 2007); NEFF, WAR, *supra* note 80, at 341; Charles J. Dunlap Jr., *Why Declarations of War Matter*, HARV. NAT’L SEC. J. ONLINE, Aug. 30, 2016, <http://harvardnsj.org/2016/08/why-declarations-of-war-matter/> <<https://perma.cc/BRU3-FTMK>>.

83. See *supra* note 81 and corresponding text.

84. See Article 18(1) Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter, “1954 Cultural Property Conv.”] (“Apart from the provisions which shall take effect in time of peace, the present Convention shall apply *in the event of declared war* or of any other armed conflict which may arise between two or more of the High Contracting Parties, *even if the state of war is not recognized by one or more of them*”) (emphasis added); Article 1(3) AP I (“This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the *situations referred to in Article 2 common to those Conventions*”) (emphasis added); Article 1(1) 2001 CCW Amendment to Article 1, adopted Dec. 21, 2001, UN Doc. CCW/CONF. II/2 (“This Convention and its annexed Protocols shall apply in the *situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims*”); Article 8(2) (a) and (b) ICC Statute (defining “war crimes” in relation to international armed conflicts as meaning (a) “[g]rave breaches of the *Geneva Conventions of 12 August 1949*, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention” or (b) “[o]ther serious violations of the laws and customs applicable in international armed conflict, *within the established framework of international law*”) (emphasis added).

85. E.g., with respect to Israel, on one side, and Iraq (initially as part of a coalition of Arab states), on the other, beginning in 1948, see DINSTEIN, WAR, *supra* note 13, at 49 (arguing that “[t]he [1991] Iraqi missile offensive against Israel must be observed in the legal context not of the Gulf War but of the war between Iraq and Israel which started in 1948. That war was still in progress in 1991, unhindered by its inordinate prolongation since 1948, for hostilities had flared up intermittently. As a matter of fact, war has not come to an end even two decades later”) (citation omitted); with respect to Greece and Albania, as of 1948, see *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 29 (Apr. 9) (stating that “it is a fact that the two coastal States did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of Albanian territory bordering on the Channel, that *Greece had declared that she considered herself technically in a state of war with Albania*, and that Albania, invoking the danger of Greek incursions, had considered it necessary to take certain measures of vigilance in this region”) (emphasis added); with respect to El Salvador and Honduras, beginning in 1969, see *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.: Nicar. intervening), 1992 I.C.J. 351, 382 (Sept. 11) (stating that, “[i]n 1969 a series of border incidents occurred, which gave rise to tension between the two countries, the suspension of diplomatic and consular relations and, finally, armed conflict, which lasted from 14 to 18 July 1969. After one hundred hours of hostilities, the Organization of American States succeeded in bringing about a cease-fire and the withdrawal of troops ; [sic] nevertheless the formal state of war between the two States was to persist for more than ten years”) (emphasis added); with respect to Pakistan and India, in 1971, see *Pakistan, I.C.J. Pleadings, Trial of Pakistani Prisoners of War* (Pak. v. Ind.), May 11, 1973, <http://www.icj-cij.org/docket/files/60/9460.pdf> <<https://perma.cc/AZR7-2AYB>> (pleading that, “[o]n 21 November 1971, taking advantage of the internal situation in East Pakistan, and acting in breach of her obligations under the

In light of that possible ongoing legal relevance of the concept of the state of war, a few considerations on the contours of such wars and the termination of those wars merit attention. Jann Kleffner explains that “the existence of a ‘state of war’ in the formal sense depends on the intention of one or more of the States concerned and commonly commences with a declaration of war.”⁸⁶ He emphasizes, however, that the existence of a “state of war” in the formal sense “is not dependent on the actual occurrence of hostilities.”⁸⁷ Thus, even without the occurrence of hostilities, the existence of a state of war in the legal sense might entail implications for (the termination of) IHL provisions concerning, among other things:

- Prohibitions on the threat of denial of quarter;⁸⁸
- Internment of nationals of the enemy state;⁸⁹ or
- Seizure of the property of the enemy state or property of its nationals.⁹⁰

United Nations charter, the Government of India launched direct armed attacks against Pakistan’s Eastern Province. These armed attacks continued to mount until Pakistan was forced to take measures in self-defence. The fighting spread to West Pakistan and *resulted in a state of war between India and Pakistan on 3 December 1971. India notified the existence of a state of war to Pakistan through the Government of Switzerland on 4 December 1971*) (emphasis added); with respect to Panama and the U.S., as of December 1989, see William Branigin, *Noriega Appointed ‘Maximum Leader,’* THE WASH. POST, Dec. 16, 1989, A21 (reporting that a “Panamanian legislative body formed by Gen. Manuel Antonio Noriega today named him head of government, formally granted him sweeping powers and *declared the country to be ‘in a state of war’ with the United States* because of American economic sanctions”) (emphasis added); see also United States v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992) (finding that, “[h]owever the [U.S.] government wishes to label it, what occurred in late 1989–early 1990 was clearly an ‘armed conflict’ within the meaning of Article 2 [of GC III]. Armed troops intervened in a conflict between two parties to [GC III]”) (citation omitted); with respect to the Democratic Republic of Congo and certain surrounding states, including Rwanda and Uganda, in and around 2000, see Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Bel.), Oral Hearing, CR 2000/32, Nov. 20, 2000, <http://www.icj-cij.org/docket/files/121/4231.pdf> <<https://perma.cc/Y398-NEPW>> (stating that “[t]he representatives of these States have already met at Lusaka and elsewhere. It is urgently necessary that the Democratic Republic of the Congo should take part in these discussions, in these meetings, which are intended to put an end to the *present state of war*”) (emphasis added).

86. Jann K. Kleffner, *Peace Treaties*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 7 (2011) [hereinafter, “Kleffner, *Peace Treaties*”].

87. *Id.*

88. That is, declaring that there shall be no survivors; see Article 23(d) Hague Regulations (“In addition to the prohibitions provided by special Conventions, it is especially forbidden ... (d) To declare that no quarter will be given;”); Article 40 AP I (“It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis”). See DINSTEIN, WAR, *supra* note 13, at 10 n.33 (stating that, “[i]n some extreme instances, even when the state of war exists only in a technical sense, a Belligerent Party may still be in breach of the *jus in bello*. Thus, the mere issuance of a threat to an adversary that hostilities would be conducted on the basis of a ‘no quarter’ policy constitutes a violation of Article 40 [of AP I]”).

89. See, e.g., Laura M. Olson, *Admissibility of and Procedures for Internment*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

90. See Hans-Georg Dederer, *Enemy Property*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015). Some of these provisions—concerning prohibitions on the threat of denial of quarter, internment of nationals of the enemy state, or seizure of the property of the enemy state or property of its nationals—may apply in a state of war in the legal sense even where no armed hostilities occur between the belligerent states. Thus, for example, so long as a state of war in the legal sense exists and even if there are no armed hostilities between the belligerent states, under the terms of Article 40 of AP I “[i]t

Further, at least traditionally, a state of war in the legal sense gives rise to the application of the law of neutrality.⁹¹ In turn, the law of neutrality imposes manifold obligations on and establishes rights of the parties to the conflict. The law of neutrality also traditionally imposes obligations on neutral states and other states not party to the conflict, pursuant to the duty of non-participation and impartiality.⁹² Moreover, depending on the municipal system, domestic-law implications might arise from the existence of a state of war in the legal sense, such as with respect to trade restrictions, frustration of contracts, or liability for insurance claims.⁹³

Despite these stakes, ascertaining the end of a state of war in the legal sense may pose interpretive and factual challenges. The first and foremost function of peace treaties, strictly speaking, according to Kleffner, is to “terminate the ‘state of war’ between the belligerent States and to restore amicable relations between them.”⁹⁴ Yet, at least according to some practice, it appears that a peace treaty may no longer be a prerequisite to terminate a state of war in the legal sense.⁹⁵ Contemporary practice, meanwhile, illustrates that the various legally-relevant end-points concerning a state of war in the legal sense may span a long period.⁹⁶

International Armed Conflict

The international-legal concept of IAC, as initially laid down in the Geneva Conventions of 1949, was developed, in part, to make the threshold of application more objective and factual and thereby remove the need for the relatively subjective and formal political recognition of a state of war in the legal sense.⁹⁷ GCs I–IV do

is prohibited to *order* that there shall be no survivors” or “to *threaten* an adversary therewith.” Article 40 AP I (emphasis added). Recall that Article 40 of AP I provides a list of three separate prohibitions (“It is prohibited to order that there shall be no survivors, to threaten an adversary therewith *or* to conduct hostilities on this basis”) (emphasis added). Moreover, it is arguable that, under those same conditions (a state of war in the legal sense, even without armed hostilities between the belligerent states), it would be a war crime under the ICC’s Statute to declare that no quarter will be given. Article 8(2)(b)(xii) ICC Statute. Recall that Article 8(2)(b) of the ICC’s Statute provides that war crimes listed under that paragraph consist of “[o]ther serious violations of the laws and customs *applicable in international armed conflict, within the established framework of international law.*” Emphasis added.

91. See Bothe, *The Law of Neutrality*, *supra* note 58, at 555–56 (arguing that “the threshold [of the application of the law of neutrality] must be determined according to the object and purpose of the law of neutrality. This means that the law of neutrality must be applied in any conflict which has reached a scope which renders its legal limitation by the application of the law of neutrality meaningful and necessary. It is, however, impossible to establish this threshold in a general way. One can only say that there must be a conflict of a certain duration and intensity”). *Id.* at 556.

92. See generally Bothe, *Concept and Rules*, *supra* note 58.

93. See, with respect to the U.K., McNAIR AND WATTS, *LEGAL EFFECTS*, *supra* note 82, at 117–202.

94. Kleffner, *Peace Treaties*, *supra* note 86, at ¶ 7.

95. See DINSTEIN, *WAR*, *supra* note 13, at 48 (arguing that “[a] war may be terminated not only in a treaty of peace or in an armistice agreement. It may also come to an end by (i) implied mutual consent; (ii) as a result of *debellatio* of one of the Belligerent Parties; or (iii) by a unilateral declaration”).

96. See *infra* this section (concerning the WWII-rooted situations regarding the U.S. and Germany and regarding Japan and Russia).

97. See Milanovic, *End of IHL Application*, *supra* note 13, at 168. As Kleffner explains, “the States concerned can evade the existence of a state of war in the formal sense by abstaining from making a formal declaration of war, despite the fact that large scale hostilities may occur between them.” Kleffner, *Peace Treaties*, *supra* note 86, at ¶ 7 (citations omitted).

not expressly define what constitutes an IAC, however. And different conceptions have arisen in practice and jurisprudence.⁹⁸

For its part, Additional Protocol I of 1977 applies—in addition to the same situations as GCs I–IV⁹⁹—to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”¹⁰⁰

In 1995, in relation to the dissolution of Yugoslavia, the Appeals Chamber of the ICTY held, with respect to the international-legal concept of IAC, that:

[A]n armed conflict exists whenever there is a *resort to armed force between States* [IHL] applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.... Until that moment, [IHL] continues to apply in the whole territory of the warring States ..., whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the *intensity requirements* applicable to ... international ... armed conflicts.”¹⁰¹

On their terms, these sections of the seminal *Tadić* decision by the ICTY Appeals Chamber seem to point to two approaches to the existence of an IAC to which IHL applies. The first encompasses situations “whenever there is a *resort to armed force between States*.”¹⁰² And the second includes situations where certain “hostilities exceed the *intensity requirements* applicable” to IACs.¹⁰³ On numerous subsequent occasions, ICTY Trial Chambers and the ICTY Appeals Chamber have endorsed the first prong (that is, an IAC to which IHL applies “whenever there is a resort to armed force between States”).¹⁰⁴ Certain military manuals, judges, and other

98. For its part, GC III recognizes that an IAC may exist where a state deploys not only a regular force but also an irregular force against another state so long as that force “belongs” (in such IHL-of-IAC terms) to the deploying state and the deploying state exercises sufficient control over it. Article 4(A)(2) GC III. This standard is “overall control” in the view of the Appeals Chamber of the ICTY. *Prosecutor v. Tadić*, Judgment, ICTY Appeals Chamber, IT-94-1-A, July 15, 1999, ¶¶ 122 and 131; *but see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Her. v. Serb. & Monte.), 2007 ICJ 43, 210 (Feb. 26).

99. Article 1(3) AP I.

100. Article 1(4) AP I. Article 3 AP I governs the temporal scope of application.

101. *Prosecutor v. Dusko Tadić a/k/a “Dule,”* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, IT-94-1-I, Oct. 2, 1995, ¶ 70 (emphasis added) [hereinafter, “*Tadić*, Decision on Interlocutory Appeal”].

102. *Id.*

103. *Id.* (emphasis added).

104. See the citations in *Boškoski*, Trial Judgement, *supra* note 4, at ¶ 175 n.730.

actors have also referenced that prong.¹⁰⁵ Reference to the second prong in the *Tadić* approach to the existence of an IAC to which IHL applies (that is, that hostilities must meet or exceed the “intensity requirements applicable” to IACs) is made far less frequently than to the first.¹⁰⁶ In that light, it would appear that, under current international law, the requisite-intensity approach constitutes the alternative view of when an IAC to which IHL applies comes into existence.¹⁰⁷

In any event, the intensity of hostilities between two or more states may have significance with respect to the applicability of the law of neutrality.¹⁰⁸ According to Bothe, the “fundamental changes” brought about through the law of neutrality “are not triggered by every armed incident, but require an armed conflict of a certain duration and intensity.”¹⁰⁹ Bothe argues that, while it is not possible to establish this threshold in a general way, “the threshold of application of the law of neutrality is probably higher than that for the rules of the law of war relating to the conduct of hostilities and the treatment of prisoners, which are applicable also in conflicts of less intensity.”¹¹⁰

Finally, at least according to some commentators, where a state uses force

105. It is noted and excerpted, but not expressly endorsed, in U.K. MIN. OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.3.1 (2004) [hereinafter, “U.K., JOINT SERVICE MANUAL”]. It is also recalled, in passing, by Judge Simma, of the ICJ, in his separate opinion in *Democratic Republic of the Congo v. Uganda*. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 341 (Dec. 19), ¶ 23 (Sep. Op. Judge Simma). The logic of the first prong of the *Tadić* IAC yardstick tracks the ICRC’s *Commentaries* on GCs I–IV. See GC I 1952 COMMENTARY, *supra* note 68, at 32 (stating that “[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of article 2 [of GCs I–IV], even if one of the Parties denies the existence of a state of war”) (emphasis added); accord GC II 1960 COMMENTARY, *supra* note 68, at 28; GC III 1960 COMMENTARY, *supra* note 68, at 23; GC IV 1958 COMMENTARY, *supra* note 68, at 20). For its part, the U.S. Department of Defense’s *Law of War Manual* (Dec. 2016) states—though not in the exact terminology of the first prong of the *Tadić* holding—that IACs, include “any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting.” LAW OF WAR MANUAL, *supra* note 44, at § 3.4.2 (emphasis added; citations omitted). With respect to armed conflict at sea, see Article 1 INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, <http://www.icrc.org/ihl.nsf/FULL/560?OpenDocument> (stating that “[t]he parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used”) (emphasis added).

106. Nonetheless, the authors of an International Law Association report argue that at least two characteristics are found with respect to all armed conflicts (whether of an international or non-international character): (1) the existence of organized armed groups (2) engaged in fighting of “some intensity.” See ILA, *Meaning of Armed Conflicts*, *supra* note 14, at 320.

107. This required-intensity approach to IAC has been criticized on the grounds (among others) that “[t]o import an intensity requirement into the definition of international armed conflicts is effectively to assert that no law governs the conduct of military operations below that level of intensity, including the opening phase of hostilities.” Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 41 (Elizabeth Wilmshurst ed., 2012) [hereinafter, “Akande, *Classification*”].

108. With respect to neutral powers under GCs I–IV, see Yves Sandoz, *Rights, Powers, and Obligations of Neutral Powers under the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

109. Bothe, *The Law of Neutrality*, *supra* note 58, at 1106.

110. *Id.*

directed at a non-state organized armed group in the territory of a foreign state without that foreign state's consent, a double classification cannot be excluded.¹¹¹ Under this logic, both an IAC (between the attacking state and the foreign state, even though the hostile action is not directed between the armed forces of those respective states) *and* a NIAC (between the attacking state and the organized non-state armed group) may arise.¹¹²

Belligerent Occupation

Under Article 42 of the Regulations concerning the Laws and Customs of War on Land annexed to Convention (IV) respecting the Laws and Customs of War on Land of 1907 (Hague Regulations), “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. [¶] The occupation extends only to the territory where such authority has been established and can be exercised.”¹¹³ In addition to applying with respect to declared wars and IACs, GCs I–IV “shall also apply to all cases of partial or total occupation of the territory” of a state party, even if the “occupation meets with no armed resistance.”¹¹⁴ Questions have arisen as to whether “occupation” and “occupied territory” in GC IV mean the same thing as “belligerent occupation” under Article 42 of the Hague Regulations and under customary international law.¹¹⁵

In discussing how belligerent occupations may end, Dinstein divides the practice into two categories: a complete end or a partial end.¹¹⁶ Ways he identifies to bring

111. See Akande, *Classification*, *supra* note 107, at 75.

112. See also GC I 2016 COMMENTARY, *supra* note 68, at ¶ 261 (stating that, “[i]n some cases, the intervening State may claim that the violence is not directed against the government or the State’s infrastructure but, for instance, only at another Party it is fighting within the framework of a transnational, cross-border or spillover non-international armed conflict. Even in such cases, however, that intervention constitutes an unconsented-to armed intrusion into the territorial State’s sphere of sovereignty, amounting to an international armed conflict within the meaning of common Article 2(1) [of GCs I–IV]”) (citing to Akande, *Classification*, *supra* note 107, at 74–75).

113. Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2295 [hereinafter, “Hague Regulations”]. In the authentic (French) language of the treaty: “Un territoire est considéré comme occupé lorsqu’il se trouve placé de fait sous l’autorité de l’armée ennemie. [¶] L’occupation ne s’étend qu’aux territoires où cette autorité est établie et en mesure de s’exercer.”

114. Common Article 2(2) GCs I–IV; see also Article 1(3) AP I.

115. See, e.g., Akande, *Classification*, *supra* note 107, at 45–46. Drawing on GC I 1952 COMMENTARY, *supra* note 68, the ICTY has distinguished between these standards in relation to obligations to the civilian population:

[T]he application of the law of occupation as it affects ‘individuals’ as civilians protected under [GC] IV does not require that the occupying power have actual authority. For the purposes of those individuals’ rights, a state of occupation exists upon their falling into ‘the hands of the occupying power.’ Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established.

Prosecutor v. Mladen Naletilic, aka “Tuta,” and Vinko Martinovic, aka “Štela,” Judgement, ICTY Trial Chamber, IT-98-34-T, Mar. 31, 2003, ¶ 221. Thus, at least according to one scholar, “differing legal tests are applicable in determining whether the law of occupation applied, depending on whether the situation concerned individuals or other issues, such as property.” Philip Leach, *South Ossetia (2008)*, in *INTERNATIONAL LAW AND CLASSIFICATION OF CONFLICT* 341 (Elizabeth Wilmshurst ed., 2012).

116. See also GRIGNON, *L’APPLICABILITÉ TEMPORELLE*, *supra* note 13, at 101–43.

about a complete end include a treaty of peace; prescription;¹¹⁷ withdrawal from occupied territory; or a binding decision of the U.N. Security Council.¹¹⁸ And ways Dinstein identifies to bring about a partial end—“in the sense that it is finished in a segment of an occupied territory but continues in others”¹¹⁹—include:

- An agreement between the parties, which might, though not necessarily, be in the form of a peace treaty;¹²⁰
- A tide of hostilities, as “the front line of the two Belligerent Parties may crest and recede alternately,”¹²¹ or
- A unilateral declaration of the occupying power.¹²²

AGREEMENTS BETWEEN PARTIES

Agreements between two or more adverse parties to an IAC might address such issues as suspending hostilities, terminating war, or (re)establishing peaceful relations. Such agreements have taken various forms, including ceasefires (or truces¹²³), armistices, peace treaties, and final settlements.

117. According to Dinstein,

It is theoretically possible that war is terminated (either by a treaty of peace, which neglects to advert to the fate of the occupied territory, or otherwise), hostilities are long over, yet the actual occupation continues as before, without the displaced sovereign or anybody else challenging this reality. Under such conditions, there may ultimately be a ‘continuous and peaceful display of State authority during a long period of time,’ in the words of the Arbitrator M. Huber, in 1928, in the *Island of Palmas* case. If so, title may be acquired by the State in charge through prescription, although that would be contingent on a peaceful and uncontested possession over a protracted period of time through presumed acquiescence.

YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 270 (2009) [hereinafter, “DINSTEIN, BELLIGERENT OCCUPATION”] (citing to *Island of Palmas* case (Netherlands v. USA), 1928, 2 RIAA 829, 869 and to M. N. SHAW, *INTERNATIONAL LAW* 426 (5th ed., 2003)).

118. See DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 117, at 273 (pointing to Resolution 1546 (2004), in which the Council welcomed the fact that the occupation will end by the end of June 2014, at which point Iraq will reassert its full sovereignty as a result of the formation of a “fully sovereign and independent Interim Government,” and emphasizing that—even if, in practice, the occupation has come to a close only “notionally” due to the continued presence and combat operations of Coalition forces, which, in theory, since the end of June 2014, continue their presence in Iraq at the invitation of the new Iraqi Government—“since Resolution 1546 is a binding decision, adopted by the Security Council under the aegis of Chapter VII of the Charter of the United Nations, it must be seen as ‘overriding the rules of IHL on this subject,’ due to the “combined effect of Articles 25 and 103 of the Charter.” *Id.* (citations omitted).

119. *Id.* at 274.

120. Giving the example of the 1979 Treaty of Peace between Israel and Egypt yet emphasizing that, “[a]s long as the Occupying Power does not relinquish *in toto* its effective control in a particular segment of an occupied territory, the occupation there is not really over.” *Id.* at 275.

121. Yet emphasizing that “[t]he loss of effective control over a distinct portion of the occupied territory denotes the end of occupation there, regardless of the position elsewhere.” *Id.* at 276.

122. Though accentuating—through the example of the situation concerning the Gaza Strip—that such a declaration must be strictly scrutinized to determine whether the facts underlying it actually finish the occupation in a segment of an occupied territory. *Id.* at 276–280.

123. According to Valentina Azarova and Ido Blum,

Truce is the oldest term, which originally had a religious connotation. A ‘Truce of God’ (*Treuga Dei*) was a measure by which the Catholic Church suspended warfare on certain days for religious reasons.

In general, a suspension of hostilities—which, under the traditional view, is often termed a truce, an armistice, or a ceasefire—is an agreed cessation of fighting within a period of armed conflict.¹²⁴ GC I contemplates, for example, that parties to an IAC to which that instrument applies might agree to suspend hostilities in order to establish arrangements aimed at permitting:

- The removal, exchange, or transport of the wounded left on the battlefield;
- The removal or exchange of the wounded and sick from a besieged or encircled area; or
- The passage of medical and religious personnel and equipment en route to a besieged or encircled area.¹²⁵

Practice suggests that a suspension of hostilities may be general (applicable to the entire IAC) or limited (applicable only to a portion of the IAC).

Kleffner argues that “peace treaties *stricto sensu* are agreements concluded between belligerent States in written form and governed by international law that bring to an end the formal or material state of war between them.”¹²⁶ (As explored in Section 5, peace agreements are not limited to instruments concluded between states but can also include agreements with non-state parties as well.) Examples of peace treaties include those between Israel and Egypt (1979)¹²⁷ and between Israel and Jordan (1994).¹²⁸ Eritrea and Ethiopia concluded a “Peace Agreement” in 2000.¹²⁹ Peace treaties may include a final settlement of all outstanding disputes. But practice also demonstrates that it is possible to forgo the ironing out of certain outstanding political or other issues in a peace treaty and instead to reserve those issues for a separate final settlement.¹³⁰

IHL treaties do not prescribe the order of steps or the timeline along which parties to an IAC must elect to make war-terminating agreements. In certain cases, such as with respect to the U.S. and Germany concerning WWII, decades have spanned the promulgation of an official statement on the end of a state of war in the legal sense and the adoption of an agreement fully restoring relations between the states:

- Congress passed a joint resolution declaring war on Germany, which the

The term ‘ceasefire’ was introduced into international legal parlance in the post-World War II era. Although some scholars ascribe to truce and ceasefire divergent implications, contemporary State practice—for the most part—treats them as synonymous.

Valentina Azarova and Ido Blum, *Suspension of Hostilities*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (2015).

124. *Id.* at ¶ 1.

125. Article 15(2)–(3) GC I.

126. Kleffner, *Peace Treaties*, *supra* note 86, at ¶ 1.

127. See Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, Egypt-Isr., 18 I.L.M. 362 (1979).

128. See Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, Isr.-Jordan, 34 I.L.M. 43 (1995).

129. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec. 12, 2000, 40 I.L.M. 260 (2001).

130. See, e.g., Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186 (1990).

President signed on December 11, 1941;¹³¹

- President Truman proclaimed—despite the continued existence of “a state of war”—the “cessation of hostilities of World War II” as of noon on December 31, 1946;¹³²
- The state of war with the “Government of Germany” was terminated on October 19, 1951 by Joint Resolution of Congress;¹³³ yet
- The U.S. and Germany never signed a peace treaty, and the final settlement came into effect around five decades after the termination of the state of war.¹³⁴

A starker illustration arises with respect to Japan and Russia (formerly the Union of Soviet Socialist Republics) concerning WWII. Those states issued a Joint Declaration on October 19, 1956 that ended the state of war and restored “peace, friendship and good-neighbourly relations between them.”¹³⁵ But, as of February 2017, a final settlement between Japan and Russia remains elusive, due in part to a territorial dispute primarily revolving around the issue of sovereignty of certain Kuril Islands.¹³⁶

Some ambiguity lies in the current international-legal position of armistices and ceasefires in relation to war termination. The main issue is whether such war-suspending agreements may (only) halt hostilities or may (also) function as armed-conflict-terminating instruments.¹³⁷ A practical manifestation of that interpretative

131. See Jennifer K. Elsea and Matthew C. Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, CONG. RES. SERV., Apr. 18, 2014, at 3 (citations omitted).

132. Pres. Proc. No. 2714, Proclamation 2714, 61 Stat. 1048–49 (stating that, “[a]lthough a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated. [¶] Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o’clock noon, December 31, 1946”) (emphasis original).

133. 65 Stat. 451, Ch. 519; see also Presidential Proclamation 2950, Oct. 24, 1951 (stating that, “[w]hereas the Congress of the United States by a joint resolution, approved October 19, 1951 (Public Law 181, 82d Congress), has resolved that the state of war declared to exist between the United States and the Government of Germany is terminated and that such termination shall take effect on the date of enactment of such resolution: [¶] Now, Therefore, I, Harry S. Truman, President of the United States of America, pursuant to such joint resolution, do proclaim that the state of war between the United States and the Government of Germany declared by the joint resolution of Congress approved December 11, 1941 was terminated on October 19, 1951”) (emphasis original).

134. See Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186 (1990); see generally Barbara Salazar Torreon, *U.S. Periods of War and Dates of Recent Conflicts*, CONG. RES. SERV., Sept. 29, 2016.

135. Article 1 Joint Declaration by the Union of Soviet Socialist Republics and Japan, Oct. 19, 1956, 263 U.N.T.S. 99.

136. See, e.g., Yakov Zinberg, *Kuril Islands*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011).

137. Compare Dinstein, *Armistice*, *supra* note 30, at ¶ 1 (stating that, “[a]s for armistice, its meaning has been transformed from suspension of hostilities to termination of war, without, however, introducing peace in the full sense of that term”) (emphasis added; internal cross-references omitted) with LAW OF WAR MANUAL, *supra* note 44, at § 12.11.1.2 (stating that “[a]n armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties to the conflict. War

disagreement—which might entail significant implications with respect, among other things, to the *jus ad bellum*—concerns the ceasefire provision of U.N. Security Council Resolution 687 (1991), addressing the Persian Gulf War, especially whether that formulation effectively functioned, in the circumstances, in a role similar to that of a traditional peace treaty.¹³⁸

Traditionally, armistices were conceptualized as suspending hostilities between the relevant warring states.¹³⁹ The U.S. Department of Defense’s *Law of War Manual* (Dec. 2016)—according to which an “armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties to the conflict”¹⁴⁰—aligns with that approach. Yet, since the WWII cases of Italy, Romania, and Hungary, at least some armistices have been interpreted to have effectively functioned as war-terminating instruments.¹⁴¹ Additional examples of armistices purportedly functioning in this way include certain practice pertaining to Israel and some Arab states (1948);¹⁴² Egypt and Israel (1949);¹⁴³ and the Korean peninsula (1953).¹⁴⁴

For its part, the Royal Australian Air Force’s *Operations Law for RAAF Commanders* states that “[t]he clearest way of ending hostilities is by a peace treaty. This may follow the unconditional surrender of a party.”¹⁴⁵ Yet, the RAAF’s

as a legal state of hostilities between parties may continue, despite the conclusion of an armistice agreement”) (emphasis added; citations omitted).

138. See *infra* footnotes 351–53 and accompanying text.

139. On armistices, see generally Richard Baxter, *Armistices and Other Forms of Suspension of Hostilities*, in HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER 309–40 (Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel, and Charles Keever eds., 2013); Dinstein, *Armistice*, *supra* note 30.

140. LAW OF WAR MANUAL, *supra* note 44, at § 12.11.1.2 (and further stating that “[w]ar as a legal state of hostilities between parties may continue, despite the conclusion of an armistice agreement. [¶] In some cases, however, armistice agreements may be intended to be a prelude to peace treaties. In some cases, armistice agreements may persist for a long time”). *Id.* (citations omitted).

141. See DINSTEIN, WAR, *supra* note 13, at 42–43 (citations omitted).

142. *Id.* at 43 (citations omitted).

143. See U.K., JOINT SERVICE MANUAL, *supra* note 105, at ¶ 310 n.25 (stating that, “[i]n 1951, the UN Security Council refused to accept Egypt’s claim to be exercising belligerent rights in respect of shipping passing through the Suez Canal over two years after the 1949 armistice had put an end to the full-scale hostilities between Israel and Egypt”).

144. Military Armistice in Korea and Temporary Supplementary Agreement, signed on and entry into force on July 27, 1953, 4 U.S.T. 234 [hereinafter, “Armistice in Korea”]; but compare DINSTEIN, WAR, *supra* note 13, at 43–44 (stating that the Armistice in Korea, *supra* this note, terminated the Korean War, although it “did not produce peace in the full meaning of the term. The [Armistice in Korea] combined [in the words of Article II] ‘concrete arrangements for cease-fire and armistice’ jointly. But the crux of the matter (proclaimed in the Preamble) is that the Agreement has ‘the objective of establishing an armistice which will insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved.’ The Agreement makes it crystal clear that (in the words of Article V) it will ‘remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides.’ The thesis (advanced in 1992) that ‘the Korean War is still legally in effect,’ [*sic* is untenable”) (citations omitted) with LAW OF WAR MANUAL, *supra* note 44, at § 12.11.1.3 n.162 (citing to evidence that that agreement is still in force).

145. ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS 43 (2d ed., 2004), http://usnwc.libguides.com/ld.php?content_id=2998112 <<https://perma.cc/6R9J-2HVM>> (stating that, “[a]s with the start of hostilities, there is often controversy as to the end. In any case all commands must

Operations Law for RAAF Commanders further states that “armed conflicts also end when a general armistice is declared. This could result in a permanent end of fighting, if ratified by political authorities.”¹⁴⁶

In any event, the broader point should not be eclipsed: in relation to an IAC, states recognize the capability of the parties to enter agreements that may impose obligations at various stages of—and that, depending on the terms, might end—the armed conflict. Of course, following the more objective, fact-based approach to the existence of an IAC, for the application of IHL to cease with respect to a particular IAC pursuant to a war-terminating instrument, the adoption of that instrument must be accompanied by the actual end of hostilities. Otherwise, under the objective approach to the existence of an IAC, IHL will continue to apply in relation to the ongoing IAC between the parties.¹⁴⁷

IHL-OF-IAC TREATY PROVISIONS

This sub-section outlines IHL treaty provisions pertaining to the end of IAC and to the cessation of the applicability of (a portion of) IHL in relation to IAC.

IHL Treaty Provisions on the End of Military Operations Other Than in a Belligerent Occupation

Under Article 6(2) of GC IV, “[i]n the territory of Parties to the conflict, the application of [GC IV] shall cease *on the general close of military operations*.”¹⁴⁸ Article 3(b) of AP I similarly provides that “the application of [GCs I–IV and AP I] shall cease, in the territory of Parties to the conflict, *on the general close of military operations*....”¹⁴⁹ Yet neither GC IV nor AP I defines the component concepts of the “general close” and “military operations.” At least according to the U.S. Department of Defense’s *Law of War Manual* (Dec. 2016), “[i]n most cases, the general close of military operations [in the sense of Article 6(2) GC IV] will be *the final end of all fighting between all those concerned*.”¹⁵⁰

be informed immediately as to the terms of any cessation of hostilities”).

146. *Id.*

147. Recall that the temporal demarcation of the end of conflict may entail implications in the domestic-legal system, which we do not address here.

148. Emphasis added. *See also Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70 (stating that, “[n]otwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought *military operations in the region to a close*”) (emphasis added).

149. Emphasis added. Along the lines of Article 6(2) of GC IV and Article 3(b) of AP I, the U.K. Ministry of Defence’s *The Joint Service Manual of the Law of Armed Conflict* (2004) states that “[t]he law of armed conflict applies from the beginning of an armed conflict until the general close of military operations.” U.K., JOINT SERVICE MANUAL, *supra* note 105, at ¶ 3.10. This statement appears in the part of the *Manual* concerning “The Beginning and End of Application” and does not distinguish between IACs and NIACs. In the section on the applicability of Common Article 3 of GCs I–IV, that *Manual* notes and excerpts the definition of IAC and NIAC—including the temporal parameters—laid down in *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70, but does not expressly endorse it. *See id.* at ¶ 15.3.1.

150. LAW OF WAR MANUAL, *supra* note 44, at § 10.3.4 (emphasis added) (citing to GC IV 1958 COMMENTARY, *supra* note 68, at 62: “What should be understood by the words ‘general close of military operations’? In the opinion of the Rapporteur of Committee III, the general close of military operations was ‘when the last shot has been fired’. There are, however, a certain number of other factors to be taken into account. When the struggle takes place between two States the date of the close of hostilities is fairly

For its part, the ICRC defines, in this context, “military operations” as “the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat.”¹⁵¹ According of the ICRC’s *Commentary on GC I* (2016), “[e]ven in the absence of active hostilities,”¹⁵² military operations such as “redeploying troops along the border to build up military capacity or mobilizing or deploying troops for defensive or offensive purposes” will justify maintaining the classification of the situation as an [IAC].”¹⁵³

IHL Treaty Provisions pertaining to the End of Occupation

Four different sets of formulations that pertain to the end of application *rationae temporis* in relation to situations of occupation have been expressly laid down in three IHL instruments: one in the Hague Regulations; two in the Geneva Conventions of 1949; and another in Additional Protocol I.

The part of the Hague Regulations that deal with belligerent occupation temporally affix two sets of obligations—one pertaining to submarine cables and another pertaining to private property susceptible to direct military use—to “when peace is made.”¹⁵⁴ First, under Article 54 of the Hague Regulations, “[s]ubmarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. Such cables must likewise be restored and compensation fixed *when peace is made*.”¹⁵⁵ Second, under Article 53(2) of the Hague Regulations,

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed *when peace is made*.¹⁵⁶

The obligation is thus to both restore and pay compensation, irrespective of whether certain factual scenarios, such as a long occupation, would in practice make it

easy to decide: it will depend either on an armistice, a capitulation or simply on *debellatio*. On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned”); *see also* GRIGNON, *L’APPLICABILITÉ TEMPORELLE*, *supra* note 13, at 275–81.

151. COMMENTARY ON THE APs, *supra* note 68, at 67.

152. On the relationship between the notion of the cessation of (active) hostilities and the general close of military operations, as those concepts are laid down in GC III, GC IV, and AP I, *see* GRIGNON, *L’APPLICABILITÉ TEMPORELLE*, *supra* note 13, at 281–82.

153. GC I 2016 COMMENTARY, *supra* note 68, at ¶ 279.

154. In the original French text: “à la paix.” The Hague Regulations also fix temporal standards concerning such issues as release of prisoners of war, but those have been superseded by subsequent treaties.

155. Emphasis added.

156. Emphasis added. According to the U.S. Department of Defense’s *Law of War Manual* (Dec. 2016), Private property susceptible of direct military use includes cables, telephone and telegraph facilities, radio, television, telecommunications and computer networks and equipment, motor vehicles, railways, railway plants, port facilities, ships in port, barges and other watercraft, airfields, aircraft, depots of arms (whether military or sporting), documents connected with the conflict, all varieties of military equipment (including that in the hands of manufacturers), component parts of, or material suitable only for use in, the foregoing, and, in general, all kinds of war material.

LAW OF WAR MANUAL, *supra* note 44, at § 11.18.6.2 (citation omitted).

difficult, if not impossible, to restore the property.

Article 6(3) of GC IV provides that “[i]n the case of occupied territory, the application of [GC IV] shall cease *one year after the general close of military operations*.”¹⁵⁷ That same paragraph also lays down that “the Occupying Power shall be bound, *for the duration of the occupation*, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.”¹⁵⁸ These latter obligations—concerning the exercise of the functions of government subsequent to the period one year after the general close of military operations—have been characterized, by commentators, as a “hard core”¹⁵⁹ of “post-hostilities”¹⁶⁰ obligations. Those provisions pertain, for example, to:¹⁶¹

- The continued function of the Protecting Power;¹⁶²
- Humane treatment;¹⁶³
- Rights as against change by annexation or arrangement with the local authorities so long as occupation lasts;¹⁶⁴
- Transfers, evacuation, and deportation;¹⁶⁵
- Prohibitions against certain compulsory service and protection of workers;¹⁶⁶
- Respect for property;¹⁶⁷
- Facilitating relief programs;¹⁶⁸
- Criminal proceedings;¹⁶⁹ and
- Access by Protecting Powers and the ICRC.¹⁷⁰

Notably, Article 78 of GC IV (concerning internment) is not included in this list of “hard core” “post-hostilities” obligations.¹⁷¹

In the Advisory Opinion concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), the ICJ interpreted the temporal trigger of Article 6(3) of GC IV: “[s]ince the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of

157. Emphasis added. See *infra* this section regarding the provisions in Article 6 of GC IV concerning protected persons whose release, repatriation or re-establishment may take place after such dates.

158. Emphasis added.

159. See Hans-Peter Gasser and Knut Dörmann, *Protection of the Civilian Population*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 281 (Dieter Fleck ed., 3d ed., 2013).

160. See DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 117, at 280–83.

161. See *generally* LAW OF WAR MANUAL, *supra* note 44, at § 11.3.2.

162. Article 9 GC IV.

163. Articles 27, 29–34 GC IV.

164. Article 47 GC IV.

165. Article 49 GC IV.

166. Articles 51 and 52 GC IV.

167. Article 53 GC IV.

168. Articles 59, 61–63 GC IV.

169. Articles 64–77 GC IV.

170. Article 143 GC IV.

171. See DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 117, at 282.

[GC IV] referred to in [Article 6(3)] remain applicable in that occupied territory.”¹⁷² Yet, in critiquing that analysis, commentators emphasize that Article 6(3) of GC IV does not expressly tether those obligations to the military steps *leading up* to the occupation.¹⁷³ Rather, Article 6(3) of GC IV lays down obligations for the “duration” of the period wherein the Occupying “Power *exercises the functions of government* in [occupied] territory.”¹⁷⁴ (As noted above, also in relation to Article 6(3) of GC IV, the application of other GC IV occupation obligations cease to apply one year after the general close of military operations.)

Under Article 3(b) of AP I, “the application of [GCs I–IV and AP I] shall cease ... in the case of occupied territories, *on the termination of the occupation*.”¹⁷⁵ Thus, as Dinstein explains, for contracting parties to AP I—though not for states that have not contracted into AP I, at least as a matter of treaty law—“the temporal application of [GC IV] in its entirety is extended until the actual termination of the occupation.”¹⁷⁶

IHL Treaty Provisions pertaining in relation to IAC to the End of Deprivation of Liberty of Prisoners of War, Civilian Internees, and Certain Other Persons Deprived of Liberty¹⁷⁷

Various IHL treaties establish different formulations in relation to the temporal point at which deprivation of liberty of an individual in connection with an IAC shall cease and the extent, if any, of ongoing protections beyond the termination of the relevant conflict.¹⁷⁸

Protections until Final Release, Repatriation, or Re-establishment

Under Article 5 of GC I, with respect to a designated protected person who has fallen into the hands of the enemy, GC I shall apply until that person’s final repatriation.¹⁷⁹ Similarly, under Article 5(1) of GC III, “[GC III] shall apply to the persons referred to in [Article 4 of GC III] from the time they fall into the power of the enemy and *until their final release and repatriation*.”¹⁸⁰ Under Article 6(4) of GC IV, “[p]rotected persons whose release, repatriation or re-establishment may take place after [GC IV as a whole otherwise ceases to apply, whether in the territory of the parties to the conflict or in occupied territory] shall meanwhile continue to benefit by [GC

172. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 185.

173. This ICJ reasoning has been criticized as “bewildering” because it implies that the “military operations *leading up* to the occupation” is the temporal benchmark relevant to the “hard core” Article 6(3) GC IV obligations. See DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 117, at 283.

174. Emphasis added.

175. Emphasis added. See *infra* regarding the Article 3(b) AP I provision concerning persons whose final release, repatriation or re-establishment takes place thereafter.

176. DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 117, at 281.

177. This section does not address, for instance, the position concerning medical personnel under GC I.

178. See generally Scholdan, *The End of Active Hostilities*, *supra* note 13.

179. Article 5 GC I.

180. Emphasis added. On POW status, see, e.g., Sean Watts, *Who is a Prisoner of War?*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

IV].”¹⁸¹ And under Article 3(b) of AP I, “persons [whose final release, repatriation or re-establishment takes place after the general close of military operations or, in the case of occupied territories, on the termination of the occupation] shall continue to benefit from the relevant provisions of [GCs I–IV and of AP I] *until their final release, repatriation or re-establishment*.”¹⁸²

*Prisoners of War*¹⁸³

Under Article 118(1) of GC III, “[p]risoners of war shall be released and repatriated without delay after the *cessation of active hostilities*.”¹⁸⁴ Article 118(2) of GC III provides that, “[i]n the absence of stipulations to [that] effect in any agreement concluded between the Parties to the conflict with a view to *the cessation of hostilities*, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in [Article 118(1) of GC IV].”¹⁸⁵

The drafters of the “without delay after the cessation of active hostilities” standard set down in Article 118(1) of GC III did not define what constitutes “the cessation of active hostilities.” Yet guidance in interpreting this provision might be found, in part, by recalling the context in which the provision was written. In short, the drafters of Article 118(1) of GC III were aiming to revise the provisions concerning the release of POWs established in two earlier treaties, the relevant portions of which had proven unclear, imprecise, or otherwise undesirable. First, Article 20 of the Hague Regulations provided that “[a]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.”¹⁸⁶ And second, Article 75(1) of the 1929 Convention on Prisoners of War (which was superseded by GC III) provided that:

When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war. If it has not been possible to insert in that convention such stipulations, the belligerents shall, nevertheless, enter into communication with each other on the question as soon

181. On the scope and aim of this provision, see GC IV 1958 COMMENTARY, *supra* note 68, at 64 (“stating that “[t]he time when the Convention as a whole ceases to apply, both in the territory of the Parties to the conflict and in occupied territory, may quite conceivably come before the protected persons have been able to resume a normal existence, especially if they have to be repatriated or assisted to resettle. In the territory of the Parties to the conflict, for example, if internees are not immediately released, the rules laid down in the [GC IV] must obviously continue to apply to them, and if the State decides to repatriate certain enemy nationals, whether interned or not, their repatriation must be carried out in accordance with the [GC IV]. Similarly, in occupied territories, where an Occupying Power considers it necessary to prolong the internment of certain persons after the time limit of one year has expired, the persons concerned will continue to enjoy all their rights under the Convention”). With respect to who qualifies as a protected civilian, see, e.g., Elizabeth Salmón, *Who Is a Protected Civilian?*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015) [hereinafter, “Salmón, *Protected Civilian*”].

182. Emphasis added.

183. See generally Sassòli, *Prisoners of War*, *supra* note 13.

184. Emphasis added.

185. Emphasis added. The remaining provisions in Article 118 of GC III concern bringing such measures to the knowledge of prisoners of war and costs of repatriations.

186. Emphasis added.

*as possible. In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace.*¹⁸⁷

Compared to the provisions in Article 20 of the Hague Regulations and Article 75(1) of the 1929 Convention on Prisoners of War, “the cessation of active hostilities” formulation established in Article 118(1) obliges parties to, at a minimum, release prisoners of war at a time prior to a conclusion of peace.

But what, exactly, marks “the cessation of active hostilities” laid down in Article 118(1) of GC III? Varying interpretations are articulated in two military manuals. On one hand, the U.K. Ministry of Defence’s *The Joint Service Manual on the Law of Armed Conflict* (2004) states that the “[c]essation of active hostilities” is a question of fact and does not depend on the existence of an armistice agreement. Active hostilities have ceased *where there is no immediate expectation of their resumption*.¹⁸⁸ That *Manual* also stipulates that “[c]essation is not affected by isolated and sporadic acts of violence.”¹⁸⁹

On the other hand, the U.S. Department of Defense appears to take a somewhat different approach.¹⁹⁰ In relation to “the cessation of active hostilities” formulation established in Article 118(1) of GC III, the U.S. Department of Defense’s *Law of War Manual* (Dec. 2016) first points out that, “[a]ccording to Lauterpacht, the phrase ‘cessation of active hostilities’ probably does not refer to a situation that leaves open the possibility of a resumption of struggle, but to a situation in which it is out of the question for hostilities to resume.”¹⁹¹ The *Manual* then states that, in the sense of Article 118(1) of GC III, “[the cessation of active hostilities] is the *complete end of the fighting with clearly no probability of resumption of hostilities in the near future*.”¹⁹² The *Manual* further indicates, in relation to Article 118(1)

187. Article 75(1) Geneva Convention Relative to the Treatment of Prisoners of War, Jul. 27, 1929, 47 Stat. 2021 (emphasis added).

188. U.K., JOINT SERVICE MANUAL, *supra* note 105, at ¶ 8.169 (emphasis added; and noting, in relation to the second sentence excerpted, that “[f]ollowing the Indo-Pakistan conflict 1971, the Indian government initially refused to repatriate the more than 90,000 Pakistanis held as [prisoners of war], on the grounds that a renewal of hostilities could not be excluded. Repatriation did not in fact begin until late 1973, almost two years after the cessation of active hostilities. Similarly, after the Iran–Iraq conflict of 1980–88, repatriation did not begin until 1990”). *Id.*

189. *Id.*

190. See also Section 7 concerning considerations as to POW status (or not) in U.S. cases regarding certain war-on-terror detainees.

191. LAW OF WAR MANUAL, *supra* note 44, at § 9.37.2 (citing to LASSA OPPENHEIM, INTERNATIONAL LAW, VOLUME II: DISPUTES, WAR AND NEUTRALITY 613 (§275) (H. Lauterpacht ed., 7th ed., 1952) (“Probably the phrase ‘cessation of active hostilities’ in the sense of Article 118 [of GC III] refers not to suspension of hostilities in pursuance of an ordinary armistice which leaves open the possibility of a resumption of the struggle, but to a cessation of hostilities as the result of total surrender or of such circumstances or conditions of an armistice as render it out of the question for the defeated party to resume hostilities”)).

192. LAW OF WAR MANUAL, *supra* note 44, at § 9.37.2 (citing to CHRISTIANE SHIELDS DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1 OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 71–72 (1977) (excerpting the following: “Is the phrase ‘end of active hostilities’ to be interpreted as referring to situations where it is clear that active hostilities have definitely stopped and will not be resumed, for example, as the result of surrender, or can it be interpreted in a more flexible way so as to take account of situations where the pattern has been an alternation of military operations and peaceful periods? If, once again, one refers to the Second World War which directly influenced the specific wording

of GC III, that “[t]he cessation of active hostilities may also be understood as describing *the point in time when belligerents feel sufficiently at ease about the future that they are willing to release and repatriate all POWs.*”¹⁹³ The *Manual* also states in this context that “[t]he cessation of active hostilities may result from a capitulation or agreement, but such an agreement is not required if there is no prospect that hostilities will resume.”¹⁹⁴ Finally, the *Manual* indicates, with respect to the “without delay” formulation in Article 118(1) of GC III, that “[t]his requirement ... does not affect the practical arrangements that must be made to ensure that repatriation takes place in a safe and orderly manner in accordance with the requirements of [GC III].”¹⁹⁵ (As a point of comparison, recall that the *Manual* states that, “[i]n most cases, the general close of military operations [which, under Article 6(2) of GC IV, marks when the application of GC IV shall cease, with certain exceptions] will be *the final end of all fighting between all those concerned.*”¹⁹⁶)

of Article 118, it would seem that what was envisaged was a situation of complete end of the war, if not in a legal sense, at least in a material one with *clearly no probability of resumption of hostilities in a near future*. The end of war for the purpose of the application of Article 118, meant the end of military operations. In the light of the history of Article 118, this would seem to be the proper interpretation to be given to it”). *Id.* at n.886 (emphasis in the quotation already appearing in the LAW OF WAR MANUAL).

193. LAW OF WAR MANUAL, *supra* note 44, at § 9.37.2 (citing to Edward R. Cummings, Acting Assistant Legal Adviser for African Affairs, Memorandum of Law to Chester A. Crocker, Assistant Secretary of State for African Affairs, Sept. 21, 1984, III CUMULATIVE DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, 3471, 3474 (excerpting the following: under GC III, “the ‘cessation’ concept describes the point in time that belligerents feel sufficiently ... [at ease] about the future that they are willing to release all prisoners of war and civilian internees”). *Id.* at n.887 (noting that alterations to the quote appear in the original).

194. LAW OF WAR MANUAL, *supra* note 44, at § 9.37.2.

195. *Id.* at § 9.37.3 (citing to GC III 1960 COMMENTARY, *supra* note 68, at 550 (excerpting the following: “The text as finally adopted states that the repatriation must take place ‘without delay after the cessation of active hostilities’. This requirement does not, of course, affect the practical arrangements which must be made so that repatriation may take place in conditions consistent with humanitarian rules and the requirements of [GC III], as defined in Article 119, paragraph 1, below, which refers to Articles 46 to 48 (relating to transfer)”).

Commentators have helped shed additional light on what marks “the cessation of active hostilities” under Article 118(1) of GC III. At least according to Sassòli, for instance, “[t]he crucial question is when active hostilities actually *end*. A mere suspension of hostilities is not sufficient; but even when there is an apparent end to hostilities, the future cannot be predicted and resumption is always possible.” Sassòli, *Prisoners of War*, *supra* note 13, at 1046 (emphasis original; citation omitted).

196. LAW OF WAR MANUAL, *supra* note 44, at § 10.3.4 (emphasis added) (citing to and excerpting GC IV 1958 COMMENTARY, *supra* note 68, at 62). Commentators have also compared “the cessation of active hostilities” provision in Article 118(1) of GC III (concerning POWs) and “the general close of military operations” formulation laid down in two provisions of GC IV and in one provision of AP I. (Recall that “the general close of military operations” provision pertains: under Article 6(2) of GC IV to the cessation of GC IV in the territories of the parties; under Article 6(3) of GC IV to the cessation of GC IV in the case of occupied territory one year after that close; and under Article 3(b) of AP I to the cessation, with certain exceptions, of AP I in the territory of the parties to the conflict.) Sassòli argues that “[o]ngoing troop movements do not preclude there being an end to active hostilities.” Sassòli, *Prisoners of War*, *supra* note 13, at 1046–47. For his part, Dinstein—in comparing temporal formulations in Article 118(1) of GC III and Article 6(3) of GC IV—contends that “[t]here is every reason to believe that [t]he general close of military operations may occur after the cessation of active hostilities.” DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 117, at 282 (citing to COMMENTARY ON THE APs, *supra* note 68, at 65, 68; internal

With respect to the “without delay” portion of the formulation set down in Article 118(1) of GC III, the Eritrea-Ethiopia Claims Commission (EECC) stated that, “given their everyday meaning and the humanitarian object and purpose of [GC] III, these words [“without delay”] indicate that repatriation should occur at an early time and without unreasonable or unjustifiable restrictions or delays.”¹⁹⁷ But, at the same time, the EECC noted, “repatriation cannot be instantaneous. Preparing and coordinating adequate arrangements for safe and orderly movement and reception, especially of sick and wounded prisoners, may be time-consuming.”¹⁹⁸ Finally in this connection, the EECC stated that “there must be adequate procedures to ensure that individuals are not repatriated against their will.”¹⁹⁹

In combination, Articles 109 and 110 of GC III establish, among other things, a different temporal formulation (compared to “the cessation of active hostilities” laid down in Article 118 of GC III) with respect to certain seriously wounded and seriously sick prisoners of war. For instance, under Article 110 of GC III, the following persons shall be “repatriated *direct*”²⁰⁰:

- (1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
- (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
- (3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

Article 109 of GC III also contains provisions concerning arrangements in neutral countries for certain sick and wounded prisoners of war. It further contains a prohibition on repatriating an eligible sick or injured prisoner of war against his will during hostilities. Article 110 of GC III additionally lays down stipulations concerning, among other things, agreements on the conditions that prisoners of war accommodated in a neutral country must fulfill in order to permit those prisoners’ repatriation.

Under Article 119(4) of GC III, “[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until *the end of such proceedings*, and, if necessary, *until the completion of the punishment*.”²⁰¹ The next sentence of Article 119(4) of GC III provides that “the same shall apply to

quotation marks omitted). “No doubt,” he avers, “the cessation of active hostilities can precede a treaty of peace, and this seems to be true also of the general close of military operations.” *Id.* (internal footnote omitted). Dinstein notes, however, that “whatever the exact meaning of the phraseology employed – as long as no final treaty of peace has entered into force – even if military operations are deemed closed at a specific point in time, they may reopen at a late date and they will then trigger the renewed operation of [GC IV] *in toto*.” *Id.* (internal footnote omitted).

197. Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War - Eritrea’s Claim 17*, XXVI REPORT OF INTERNATIONAL ARBITRAL AWARDS/RECUEIL DES SENTENCES ARBITRALES 65, July 1, 2003.

198. *Id.*

199. *Id.* (citing to Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT’L L. STUD. 421–29 (1977)).

200. Emphasis added.

201. Emphasis added.

prisoners of war already convicted for an indictable offence.”

GC III also contains provisions concerning the temporal period pertaining to adjustments between the belligerents with respect to, for instance, certain payments made to prisoners of war. The U.K. Ministry of Defence’s *The Joint Service Manual of the Law of Armed Conflict* (2004) summarizes these GC III obligations thusly: “Advances of pay, compensation payments, and payments made in their own states under [Article 63 of GC III], [*sic*] are considered to be made on behalf of the state on which prisoners of war depend and so are a matter for adjustment between the states concerned *at the close of hostilities*.”²⁰²

Finally with respect to temporal formulations established in IHL treaties concerning prisoners of war, Article 85(4)(b) of AP I provides that, “when committed wilfully and in violation of” one of the GCs I–IV or of AP I, “unjustifiable delay in the repatriation of prisoners of war”²⁰³ shall be regarded as a grave breach of AP I and thus also a war crime under AP I.²⁰⁴

*Protected Persons under GC IV and Certain Other Persons Not Qualifying as POWs under AP I*²⁰⁵

As noted above, Article 6(2)–(4) of GC IV contains provisions on when protections under that convention cease to apply. Article 6(2) of GC IV provides that, “[i]n the territory of Parties to the conflict, the application of [GC IV] shall cease on the general close of military operations.” Article 6(3) of GC IV stipulates that

[i]n the case of occupied territory, the application of [GC IV] shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of [GC IV]: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

And, under Article 6(4) of GC IV, “[p]rotected persons whose release, repatriation or re-establishment may take place after [GC IV as a whole otherwise ceases to apply, whether in the territory of the parties to the conflict or in occupied territory] shall meanwhile continue to benefit by [GC IV].”²⁰⁶

202. U.K., JOINT SERVICE MANUAL, *supra* note 105, at ¶ 8.181 (emphasis added; internal citations and cross-references omitted).

203. See *infra* regarding this provision with respect to civilians.

204. Pursuant to Article 85(5) AP I. The ICRC’s *Commentary* on this provision states that “[t]he grave breach within the meaning of sub-paragraph [Article 85]4(b) consists, in the case of prisoners of war, in failure to comply with Articles 109 or 118 of [GC III] without valid and lawful reasons justifying the delay.” COMMENTARY ON THE APs, *supra* note 68, at 1001 (citation omitted).

205. See, e.g., Laura M. Olson, *Status and Treatment of Those Who Do Not Fulfill the Conditions for Status of Prisoners of War*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

206. On the scope and aim of this provision, see GC IV 1958 COMMENTARY *supra* note 68, at 64 (stating that “[t]he time when the Convention as a whole ceases to apply, both in the territory of the Parties to the conflict and in occupied territory, may quite conceivably come before the protected persons have been able to resume a normal existence, especially if they have to be repatriated or assisted to resettle. In the territory of the Parties to the conflict, for example, if internees are not immediately released, the rules laid down in the Convention must obviously continue to apply to them, and if the State decides to repatriate certain enemy nationals, whether interned or not, their repatriation must be carried out in accordance with the Convention. Similarly, in occupied territories, where an Occupying Power considers it necessary

Over all, GC IV deals unevenly with protection of civilians. The thumbnail version is that the bulk of provisions in GC IV pertain to “protected persons,” including in occupied territories. (Nonetheless, a key part of GC IV—Articles 13–26 (Part II)—applies to the *whole population* of the countries in conflict.²⁰⁷) Such “protected persons” are defined under Article 4(1) of GC IV as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

GC IV lays down a number of temporal formulations—not least regarding deprivation of liberty—concerning those “protected persons.” Before identifying those formulations, however, it is helpful to review two GC IV provisions concerning grounds for deprivation of liberty of protected persons. First, under Article 42(1) of GC IV, where internees are detained in a state party’s own territory, “[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power *makes it absolutely necessary*.”²⁰⁸ And second, in occupied territory, under Article 78(1) of GC IV, “[i]f the Occupying Power considers it necessary, *for imperative reasons of security*, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”²⁰⁹

In three provisions, GC IV affixes the release of protected persons deprived of liberty or the lifting of certain other restrictive measures concerning those persons’ property to the following temporal formulation: “as soon as possible after the close of hostilities.”

- Under Article 46(1) of GC IV, “[i]n so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons [including depriving them of liberty pursuant to Article 42(1) of GC IV] shall be cancelled *as soon as possible after the close of hostilities*.”²¹⁰
- Article 46(2) of GC IV stipulates that “[r]estrictive measures affecting [protected persons’] property shall be cancelled, in accordance with the law of the Detaining Power, *as soon as possible after the close of hostilities*.”²¹¹ and
- Under Article 133(1) of GC IV, “[i]nternment shall cease *as soon as possible after the close of hostilities*.”²¹²

In addition, two other provisions of GC IV lay down temporal formulations concerning the release of certain protected persons. First, under Article 132(1) of

to prolong the internment of certain persons after the time limit of one year has expired, the persons concerned will continue to enjoy all their rights under the Convention”).

207. Article 13 GC IV (laying down that “[t]he provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war”).

208. Emphasis added. The rest of the article provides: “If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.” Article 42(2) GC IV.

209. Emphasis added.

210. Emphasis added.

211. Emphasis added.

212. Emphasis added. See generally Oswald, *Internment*, *supra* note 13.

GC IV, “[e]ach interned person shall be released by the Detaining Power *as soon as the reasons which necessitated his internment no longer exist*.”²¹³ And second, Article 133(2) of GC IV establishes that

[i]nternees in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained *until the close of such proceedings* and, if circumstances require, *until the completion of the penalty*. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.²¹⁴

GC IV does not, however, expressly define what constitutes “the close of hostilities.” For their part, two military manuals articulate approaches according to which the phrase “the close of hostilities”—as laid down in Articles 46(1), 46(2), and 133(1) of GC IV—should be construed, in practice, in the same sense as “the cessation of active hostilities” formulation established in Article 118(1) of GC III concerning POWs.

First, the U.K. Ministry of Defence’s *The Joint Service Manual of the Law of Armed Conflict* (2004) states that, “[a]lthough the term used in [GC IV] is ‘close of hostilities’, in practice, this would mean the same as the phrase ‘cessation of active hostilities’ used in [Article 118(1) of GC III].”²¹⁵ And second, the U.S. Department of Defense’s *Law of War Manual* (Dec. 2016) states that “[t]he phrase ‘close of hostilities’ [in GC IV] should be understood in the same sense as the phrase ‘cessation of active hostilities’ in [Article 118(1) of GC III].”²¹⁶ To support that position, the latter *Manual* cites to the ICRC’s *Commentary on GC IV*.²¹⁷ That *Commentary*, in turn, states that

[t]he expression ‘the close of hostilities’ [in GC IV] should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities. The similar provision concerning prisoners of war speaks of ‘the cessation of active hostilities’ and the wording of the paragraph here should be understood in the same sense.²¹⁸

Certain commentators do not agree with this approach, however. Oswald, for instance, argues that “[t]he qualitative difference between each of the phrases is clear. The phrase ‘close of hostilities’ suggests that hostilities have ended but that peace has not yet been established.”²¹⁹ On the other hand, “cessation of active

213. Emphasis added. Article 132(2) GC IV lays down that “[t]he Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.”

214. Emphasis added. Article 133(3) GC IV provides that “[b]y agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.” And Article 134 GC IV provides that “[t]he High Contracting Parties shall endeavour, *upon the close of hostilities or occupation*, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.” Emphasis added.

215. U.K., *JOINT SERVICE MANUAL*, *supra* note 105, at ¶ 9.36.1.

216. *LAW OF WAR MANUAL*, *supra* note 44, at § 10.35.1.1.

217. *Id.* at § 10.35.1.1 n.631 (citing to GC IV 1958 COMMENTARY, *supra* note 68, at 514–515).

218. GC IV 1958 COMMENTARY, *supra* note 68, at 514–515.

219. Oswald, *Internment*, *supra* note 13, at 1378 (citations omitted).

hostilities,” he contends, “suggests either that some military operations are still being conducted, or that hostilities exist but are not ‘active,’ and therefore armed conflict might break out sporadically and that military operations continue, albeit at a less intense level.”²²⁰

Even if those two phrases—“the cessation of active hostilities” in Article 118(1) of GC III and “the close of hostilities” in GC IV—were understood in the same sense, however, that would not necessarily end the inquiry. That is because, as explained above, “the cessation of active hostilities” established in Article 118(1) of GC III is subject to differing interpretations. Thus, the implementation of those interpretations might lead to different points in time at which the deprivation of liberty of persons under GC III or GC IV should cease.

Moreover, in this context, “the close of hostilities” is only part of the relevant phrase in Articles 46(1), 46(2), and 133(1) of GC IV. The first part of that phrase—“as soon as possible”—merits scrutiny as well. Oswald, for instance, poses the question of whether “‘as soon as possible’ [in those relevant provisions of GC IV] mean[s] that internees must be released within a particular time frame which is objectively determined, or is it the case that the time frame is a matter for the Detaining Power to determine?”²²¹ Oswald’s review of “[t]he practice of states suggests that ‘as soon as possible’ is most often determined subjectively, after the parties have reached an agreement as to when they will release internees.”²²²

For its part, Article 3(b) of AP I, as noted above, pertains to, among other things, “persons whose final release, repatriation or re-establishment takes place” after GCs I–IV and AP I cease to apply.²²³ In particular, under Article 3(b) of AP I, “[t]hese persons [that is, those whose final release, repatriation or re-establishment takes place after GCs I–IV and AP I cease to apply] shall continue to benefit from the relevant provisions of [GCs I–IV and of AP I] *until their final release, repatriation or re-establishment*.”²²⁴

But what about individuals who, in relation to an IAC, fall into the hands of a party to the conflict but who qualify neither for prisoner-of-war status under GC III or AP I nor for “protected person” status under GC IV?²²⁵ One approach—established in certain cases in the ICTY and the ICC—considers allegiance or ethnicity (not nationality) as a relevant criterion for obtaining “protected person” status.²²⁶ Yet it is far from clear that states have endorsed this interpretation.

220. *Id.*

221. *Id.* at 1377.

222. *Id.* Oswald points out that “[p]revious agreements between states have, for example, not stipulated a time period for release of internees, required release of internees after a particular event occurs, or required release at the ‘earliest possible date.’” *Id.* (citations omitted). But he also notes that there are “some examples where Detaining Powers have had to release internees ‘without delay’ or ‘immediately.’” *Id.* (citations omitted).

223. Recall that, according to Article 3(b) of AP I, the application of GCs I–IV and AP I shall, but for the following exception, “cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation.”

224. Emphasis added.

225. Due, for instance, to not fulfilling the nationality criterion under Article 4(1) of GC IV for that “protected person” status.

226. See Salmón, *Protected Civilian*, *supra* note 181, at 1142–45.

AP I addresses the underlying issue, at least with respect to contracting parties. Under Article 45(3) of AP I, “[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with [GC IV] shall have the right at all times to the protection of Article 75 [of AP I].” In turn, Article 75(4) of AP I stipulates that—“[e]xcept in cases of arrest or detention for penal offences”—“[a]ny person arrested, detained or interned for actions related to the armed conflict ... shall be released *with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.*”²²⁷ And Article 75(6) of AP I lays down that “[p]ersons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by [Article 75 of AP I] *until their final release, repatriation or re-establishment, even after the end of the armed conflict.*”²²⁸

Finally with respect to temporal formulations concerning repatriation of persons protected under AP I, Article 85(4)(b) of AP I provides that, “when committed wilfully and in violation of” one of GCs I–IV or of AP I, “unjustifiable delay in the repatriation of ... civilians”²²⁹ shall be regarded as a grave breach of AP I and thus also as a war crime under AP I.²³⁰

IHL Treaty Provisions concerning End-of-IAC Obligations pertaining to Mines, Booby-traps, and Certain Other Devices

Two provisions in Protocol II of the Convention on Certain Conventional Weapons (CCW) (as amended) expressly affix temporal formulations—especially “the cessation of active hostilities,” though without defining the phrase—to obligations concerning mines, booby-traps, and certain other devices. In particular, Article 9(2) of that instrument affixes various recording-related obligations to the

227. Emphasis added.

228. Emphasis added. The U.S. has signed but not ratified AP I. Nonetheless, according to a White House-issued statement, the U.S. Government will “choose out of a sense of legal obligation to treat the principles set forth in Article 75 [of AP I] as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.” *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, Mar. 7, 2011.

229. See *supra* this section regarding this provision with respect to prisoners of war.

230. Pursuant to Article 85(5) of AP I. The ICRC’s *Commentary* on this provision states that, “[w]ith regard to civilians, the grave breach consists in delaying the departure of a foreign national who wants to leave the territory, in violation of Articles 35 or 134 of [GC IV], without valid and lawful reasons justifying such delay.” COMMENTARY ON THE APs, *supra* note 68, at 1001. Article 35 of GC IV provides that

[a]ll protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. ... [¶] If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. [¶] Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

period “immediately after the cessation of active hostilities.”²³¹ And Article 10(1) of Protocol II of the CCW (as amended) provides that, “[w]ithout delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with” Articles 3(2) and 5 of that instrument.

IHL Treaty Provisions concerning End-of-IAC Obligations pertaining to Explosive Remnants of War

Protocol V of the CCW establishes obligations concerning certain explosive remnants of war.²³² A number of those obligations arise “after the cessation of active hostilities,” though that phrase is not expressly defined in the instrument.²³³ In particular, Article 3(1)–(3) of Protocol V of the CCW affixes certain obligations concerning clearance, removal, or destruction of explosive remnants of war to the period “after the cessation of active hostilities.”²³⁴ That same temporal formulation

231. Article 9(2) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Oct. 10, 1980, as amended May 3, 1996, 2048 U.N.T.S. 133 [hereinafter, “CCW Protocol II”]. In particular,

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.
2. All such records shall be retained by the parties to a conflict, who shall, *without delay after the cessation of active hostilities*, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control. [¶] *At the same time*, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control; provided, however, subject to reciprocity, where the forces of a party to a conflict are in the territory of an adverse party, either party may withhold such information from the Secretary-General and the other party, to the extent that security interests require such withholding, until neither party is in the territory of the other. In the latter case, the information withheld shall be disclosed as soon as those security interests permit. Wherever possible, the parties to the conflict shall seek, by mutual agreement, for the release of such information at the earliest possible time in a manner consistent with the security interests of each party.

Emphasis added.

232. Protocol on Explosive Remnants of War (CCW Protocol V), adopted Nov. 28, 2003, U.N. Doc. CCW/MSP/2003/2 (2003); entered into force Nov. 12, 2006 [hereinafter, “CCW Protocol V”].

233. See *supra* for a discussion on the phrase in relation to Article 118(1) of GC III.

234. In particular, under Article 3 of CCW Protocol V:

1. Each High Contracting Party and party to an armed conflict shall bear the responsibilities set out in this Article with respect to all explosive remnants of war in territory under its control. In cases where a user of explosive ordnance which has become explosive remnants of war, does not exercise control of the territory, the user shall, *after the cessation of active hostilities*, provide where feasible, inter alia technical, financial, material or human resources assistance, bilaterally or through a mutually agreed third party, including inter alia through the United Nations system or other relevant organisations, to facilitate the marking and clearance, removal or destruction of such explosive remnants of war.
2. *After the cessation of active hostilities and as soon as feasible*, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control. Areas affected by explosive remnants of war which are assessed pursuant to paragraph 3 of this Article as posing a serious humanitarian risk shall be accorded priority status for clearance, removal or destruction.
3. *After the cessation of active hostilities and as soon as feasible*, each High Contracting Party and party

is also attached to some of the obligations established in Article 4(2) of Protocol V of the CCW, which concerns recording, retaining, and transmission of certain information.²³⁵

IHL Treaty Provisions concerning Temporal Aspects of Denunciation or Withdrawal

Many IHL treaties contain provisions concerning temporal aspects of denunciation or withdrawal. It bears emphasis, however, that, to the extent the substantive provisions of the relevant IHL treaty are accepted as representing customary international law, denunciation of or withdrawal from that treaty would not impair the duty of the state to fulfill the obligations to which the state is otherwise subject, including through customary international law.²³⁶

The denunciation provisions in GCs I–IV establish temporal formulations concerning the end of application of the relevant convention(s) as a matter of treaty law. Pursuant to Articles 63(1) of GC I, 62(1) of GC II, 142(1) of GC III, and 158(1) of GC IV, “[e]ach of the High Contracting Parties shall be at liberty to denounce the [relevant] Convention.” As established by Articles 63(3) of GC I, 62(3) of GC II, and 142(3) of GC III,

The denunciation shall take effect one year after the notification thereof has been made However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict *shall not take effect*

to an armed conflict shall take the following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war:

- (a) survey and assess the threat posed by explosive remnants of war;
- (b) assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction;
- (c) mark and clear, remove or destroy explosive remnants of war;
- (d) take steps to mobilise resources to carry out these activities.

Emphasis added. Article 3(4) of Protocol V of the CCW stipulates that, “[i]n conducting the above activities High Contracting Parties and parties to an armed conflict shall take into account international standards, including the International Mine Action Standards.” And Article 3(5) of Protocol V of the CCW provides that “High Contracting Parties shall co-operate, where appropriate, both among themselves and with other states, relevant regional and international organisations and non-governmental organisations on the provision of inter alia technical, financial, material and human resources assistance including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil the provisions of this Article.”

235. In particular, under Article 4(2) of the CCW Protocol V:

High Contracting Parties and parties to an armed conflict which have used or abandoned explosive ordnance which may have become explosive remnants of war shall, *without delay after the cessation of active hostilities* and as far as practicable, subject to these parties’ legitimate security interests, make available such information to the party or parties in control of the affected area, bilaterally or through a mutually agreed third party including inter alia the United Nations or, upon request, to other relevant organisations which the party providing the information is satisfied are or will be undertaking risk education and the marking and clearance, removal or destruction of explosive remnants of war in the affected area.

Emphasis added. Article 4(3) of Protocol V of the CCW stipulates that “[i]n recording, retaining and transmitting such information, the High Contracting Parties should have regard to Part 1 of the Technical Annex.”

236. See, e.g., Article 43 VCLT.

*until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.*²³⁷

GC IV contains a similar provision.²³⁸ Under Article 99(1) of AP I, “[i]n case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation.” Yet, also pursuant to Article 99(1) of AP I, if

on the expiry of that year the denouncing Party is engaged in one of the situations referred to in [Article 1 of AP I], the denunciation shall not take effect before the *end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by [GCs I–IV or AP I] have been terminated.*²³⁹

The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (AP III) also contains provisions concerning temporal elements of denunciation.²⁴⁰ Under Article 14(1) of AP III, “[i]n case a High Contracting Party should denounce [AP III], the denunciation shall only take effect one year after receipt of the instrument of denunciation.” Yet, also under that same article, “[i]f ... on the expiry of that year the denouncing Party is engaged in a situation of armed conflict or occupation, the denunciation shall not take effect before *the end of the armed conflict or occupation.*”²⁴¹

With respect to the CCW, Article 9(1) lays down that “[a]ny High Contracting Party may denounce [the CCW] or any of its annexed Protocols by so notifying the Depositary.” However, Article 9(2) of the CCW stipulates, in part, that “[a]ny such denunciation shall only take effect one year after receipt by the Depositary of the notification of denunciation.” That same article also provides that if

on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in [Article 1 of the CCW], the Party shall continue to be bound by the obligations of [the CCW] and of the relevant annexed Protocols *until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the person protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.*²⁴²

237. Emphasis added.

238. Article 158(3) GC IV provides that “[t]he denunciation shall take effect one year after the notification thereof has been made.... However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect *until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by [GC IV] have been terminated.*” Emphasis added.

239. Emphasis added.

240. See Article 14 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261 [hereinafter, “AP III”].

241. Emphasis added.

242. Emphasis added.

ICTY JURISPRUDENCE CONCERNING THE END OF IAC AND THE TERMINATION OF THE APPLICABILITY OF IHL TO IAC

Few international bodies or courts have formulated general international-legal standards concerning when an IAC ends and when IHL no longer applies in relation to that conflict. The ICTY is one exception. In 1995, in its influential *Tadić* decision, the ICTY Appeals Chamber held—and numerous ICTY Trial Chambers have since endorsed the approach—that

an armed conflict exists whenever there is a resort to armed force between States [IHL] applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities *until a general conclusion of peace is reached*.... Until that moment, [IHL] continues to apply in the whole territory of the warring States ..., whether or not actual combat takes place there.²⁴³

The ICTY’s “general conclusion of peace” formulation concerning the end of application of IHL to an IAC is endorsed in the U.K. Ministry of Defence’s *The Joint Service Manual of the Law of Armed Conflict* (2004), which explains, in a footnote, that “[t]his [ICTY formulation] does not necessarily mean on the conclusion of a *formal peace treaty*.”²⁴⁴

243. *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70 (emphasis added). The Appeals Chamber intimated that certain IHL treaty-based obligations may extend beyond the cessation of fighting. *Id.* at ¶ 67 (stating that “[t]he definition of ‘armed conflict’ varies depending on whether the hostilities are international or internal but, contrary to Appellant’s contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated”) (citing to Articles 5 GC I and 5 GC III).

244. U.K., JOINT SERVICE MANUAL, *supra* note 105, at ¶ 3.10 (emphasis added). That footnote further states that “[i]n 1951, the UN Security Council refused to accept Egypt’s claim to be exercising belligerent rights in respect of shipping passing through the Suez Canal over two years after the 1949 armistice had put an end to the full-scale hostilities between Israel and Egypt.” *Id.* at n.25. This part of the *Tadić* formulation is recalled, in passing, by Judge Simma, of the ICJ, in his separate opinion in *Democratic Republic of the Congo v. Uganda*. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 341 (Dec. 19), ¶ 23 (Sep. Op. Judge Simma). For his part, Jean-François Quéguiner characterizes the ICTY Appeals Chamber’s formulations concerning the end of armed conflict and the termination of IHL in relation to conflict as an attempt “to shed light — if only a little — on this complex issue.” Jean-François Quéguiner, *Dix ans après la création du Tribunal pénal international pour l’ex-Yougoslavie : évaluation de l’apport de sa jurisprudence au droit international humanitaire*, 85 INT’L REV. RED CROSS 271, 282 (2003).

SUMMARY TABLE			
Certain IHL Treaty Provisions and ICTY Formulations concerning the End of International Armed Conflict			
		IACs Other Than Belligerent Occupations	Belligerent Occupations
Issue	Source or Authority	Provision(s)	
Concerning certain persons deprived of liberty (but not including, e.g., medical personnel under GC I)	GCs III &/or IV (1949)	"Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities ." (Art. 118(1), GC III); certain matters, e.g., advances of pay to POWs "shall form the subject of arrangements between the Powers concerned, at the close of hostilities " (Art. 67 GC III); certain wounded and sick "shall be repatriated direct " (Art. 110, GC III); "Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." (Art. 119(4) GC III); "restrictive measures taken regarding protected persons [including depriving them of liberty pursuant to Art. 42(1) of GC IV] shall be cancelled as soon as possible after the close of hostilities " (Art. 46(1) GC IV; "Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist ." (Art. 132(1) GC IV); "Internment shall cease as soon as possible after the close of hostilities ." (Art. 133(1) GC IV; see also Art. 134 GC IV))	"In the case of occupied territory, the application of [GC IV] shall cease one year after the general close of military operations ; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143(4) Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by [GC IV] ." (Art. 6(3)–(4) GC IV); "Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation , ..."; "Internment shall cease as soon as possible after the close of hostilities ." (Art. 133(1) GC IV; see also Art. 132(1) GC IV)
	AP I (1977)	"Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by [Art. 75 AP I] until final release, repatriation or re-establishment, even after the end of the armed conflict ." (Art. 75(6) AP I; see also Art. 75(3) AP I)	"persons [whose final release, repatriation or re-establishment takes place after the termination of the occupation] shall continue to benefit from the relevant provisions of [GCs I–IV and AP I] until their final release, repatriation or re-establishment ." (Art. 3(b) AP I)
General applicability of IHL and general termination of grave-breaches & war-crimes periods (other than persons deprived of liberty after the conflict)	GC IV (1949)	"In the territory of Parties to the conflict, the application of [GC IV] shall cease on the general close of military operations ." (Art. 6(2) GC IV)	"In the case of occupied territory, the application of [GC IV] shall cease one year after the general close of military operations ; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143(4) Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by [GC IV] ." (Art. 6(3)–(4) GC IV);
	AP I (1977)	Relevant AP I provisions cease to apply "in the territory of the Parties to the conflict, on the general close of military operations " (Art. 3(b) AP I; see also Art. 85 (AP I))	Relevant provisions cease to apply "in the case of occupied territories, on the termination of the occupation " (Art. 3(b) AP I; see also Art. 85 (AP I))
	ICTY (1995)	IHL continues to apply " until general conclusion of peace is reached " (ICTY, <i>Tadić</i> , 1995, ¶ 70; though more specific IHL treaty-based provisions may extend the duration of the relevant obligation [implied by reference to GCs I and III in <i>id.</i> at ¶ 67])	
Certain submarine cables	Hague Regulations (1907)	No relevant provision	"Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. Such cables must likewise be restored and compensation fixed when peace is made ." (Art. 54 HC IV HR)
Seized private "munitions de guerre" and certain related items	Hague Regulations (1907)	No relevant provision	"All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made ." (Art. 53(2) HC IV HR)
Minefields, mines and booby-traps	CCW Protocol II (as amen. 1996)	Various recording-related obligations are affixed to the period " immediately after the cessation of active hostilities " (Art. 9(2) CCW Protocol II); "[w]ithout delay after the cessation of active hostilities , all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with" Articles 3(2) and 5 (Art. 10(1) CCW Protocol II).	
Explosive remnants of war	CCW Protocol V (2003)	" After the cessation of active hostilities and as soon as feasible , each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control." (Art. 3(2) CCW Protocol V); " After the cessation of active hostilities and as soon as feasible , each High Contracting Party and party to an armed conflict shall take [certain] following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war" (Art. 3(3) CCW Protocol V); certain Contracting Parties and parties to an armed conflict " shall, without delay after the cessation of active hostilities and as far as practicable , subject to these parties' legitimate security interests, make available certain information to the party or parties in control of the affected area" (Art. 4(2) CCW Protocol V)	
Denunciation or withdrawal	GCs I–IV (1949)	"a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated ." (Articles 63(3)/62(3)/142(3) GCs I–III; see also article 158(3) GC IV)	
	AP I (1977)	"If ... on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Conventions or this Protocol have been terminated ." (Art. 99(1) AP I; see also Art. 14(1) AP III)	
	CCW (1980)	"If ... on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the person protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions ." (Art. 9(2) CCW)	

5

OVERVIEW: INTERNATIONAL HUMANITARIAN LAW PROVISIONS CONCERNING THE END OF NON-INTERNATIONAL ARMED CONFLICT

INTRODUCTION

This section outlines IHL provisions concerning the end of non-international armed conflict (NIAC) and the cessation of (a portion of) IHL in relation to NIAC. (Section 4 addresses international armed conflicts.) To lay the groundwork, we first sketch relevant international-legal concepts, with a focus on the legal criteria to determine the existence of a NIAC. We then identify, in outline form, IHL treaty provisions concerning the end of NIACs and the cessation of application of (a portion of) IHL in relation to those conflicts. We highlight, next, the possible roles of peace agreements as well as the formulation, by an international criminal tribunal, of a test whereby IHL of NIAC applies until “a peaceful settlement is achieved.”²⁴⁵ Finally, a table summarizes relevant IHL-of-NIAC treaty provisions and salient formulations drawn from international bodies.

CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT²⁴⁶

Recognition of Belligerency²⁴⁷

Prior to the advent of Common Article 3 of the four Geneva Conventions of 1949, international law already provided for the recognition of belligerency to a civil war between a state and a rebel group.²⁴⁸ A primary effect of the recognition of

245. *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70.

246. See, e.g., Lindsay Moir, *The Concept of Non-International Armed Conflict*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* (Andrew Clapham, Paola Gaeta, and Marco Sassòli eds., 2015).

247. See generally SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 9 ff. (2012).

248. See, e.g., Akande, *Classification*, *supra* note 107, at 49–50. International law also contemplated the recognition of insurgency; however, according to Crawford, “unlike the ‘next level’ of recognition—

belligerency by a third state is to bring the rules of neutrality to apply in the relations between that third state and the parties to the armed conflict (not only in relation to the government of the state but also in relation to the rebels).²⁴⁹ There are, however, relatively few, if any, recognitions of belligerency in contemporary practice, and commentators disagree on whether the concept has been, effectively, extinguished in international law.²⁵⁰

IHL Treaty Provisions concerning the Existence (or Not) of a Non-International Armed Conflict

Common Article 3 of 1949 expressly applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”²⁵¹ Subsequently, states adopted this formulation or incorporated it by reference in certain treaties that regulate NIAC.²⁵² In none of those treaties, however,

belligerency—recognizing insurgency did not bestow any international protections on the insurgent group, nor any international recognition. It was essentially a utilitarian act of recognizing a level of intensity of hostilities. Only if the insurgents fulfilled certain criteria, could they be officially, legally recognized as belligerents and be given the protections and rights granted to States under the law of armed conflict.” Emily Crawford, *Insurgency*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (2015) [hereinafter, “Crawford, *Insurgency*”]. Crawford identifies those criteria as the following: “that an organized armed group must: a) possess control of some part of the territory in which they operate; b) exercise de facto administrative control over that territory; c) possess an armed force subject to military discipline; and d) conduct their armed activities in accordance with the laws of armed conflict.” *Id.*

249. Article 2 Protocol to the Convention on Duties and Rights of States in the Event of Civil Strife (providing that “[t]he provisions of Article 1 shall cease to be applicable for a Contracting State only when it has recognized the belligerency of the rebels, in which event the rules of neutrality shall be applied”); Article 1(3) Convention on Duties and Rights of States in the Event of Civil Strife, 134 L.N.T.S. 45, entered into force May 21, 1929, 46 Stat. 2749; TS 814; 2 Bevans 694; 134 LNTS 45 (providing that “[t]he Contracting States bind themselves to observe the following rules with regard to civil strife in another one of them: ... To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied”).

250. Compare Crawford, *Insurgency*, *supra* note 248, at ¶ 5 (arguing that, “[d]espite the existence of such guidelines [as the 1863 Instructions for the Government of Armies of the United States in the Field (General Order No 100), otherwise known as the “Lieber Code,” and the Institute of International Law’s 1900 ‘Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d’émeute ou de guerre civile’] regarding recognition of belligerency, the doctrine was almost never invoked, and eventually fell into desuetude”) with Akande, *Classification*, *supra* note 107, at 50 (arguing that, “though there seem to have been no instances since the Boer War (1899–1902) in which a belligerent government has expressly recognized the belligerency of an insurgent group, there seem to have been instances of third States recognizing belligerency of insurgents operating in other countries. Also it should be remembered that even in the nineteenth century ‘most instances of recognition of belligerency...concerned implied recognition, usually by declarations of neutrality or acquiescence in confiscation of contraband or in blockade maintained by one of the belligerents’ and there have been blockades instituted in non-international armed conflicts since 1949. These blockades may be regarded as implicit recognitions of belligerency and thus internationalizing the conflict. Finally as Professor Scobbie argues, persuasively, with regard to Gaza, non-application of a doctrine of customary international law does not suffice to extinguish it. There is no concept of desuetude with regard to custom”) (citations omitted).

251. Common Article 3 (chapeau) GCs I–IV. Note that, while otherwise identical to GCs I, III, and IV, the language of Article 3(2) of GC II, due to the nature of that instrument, adds “shipwrecked” to the category of persons—in addition to the “wounded” and “sick”—who “shall be collected and cared for.”

252. See Article 19(1) 1954 Cultural Property Conv.

did states (further) define the concept of an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”

AP II purports to “develop[] and supplement[]” Common Article 3 and to do so “without modifying [Common Article 3’s] existing conditions of application.”²⁵³ With respect to AP II’s material scope of application, Article 1(1) of AP II establishes that the protocol

shall apply to all armed conflicts which are not covered by [Article 1 of AP I—that is, conflicts defined in Article 1 of AP I as being international in character] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1(2) of AP II establishes, with respect to the scope of application *ratione materiae*, that the protocol “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Article 1(2) of Protocol II of the CCW establishes those exclusions in terms of that instrument’s material scope of application.²⁵⁴

Unlike with respect to Common Article 3, states have not universally contracted into AP II.²⁵⁵ Nonetheless, as a matter of international law, NIACs that do not fall under AP II are governed at least by Common Article 3 and applicable customary IHL rules.²⁵⁶ Where applicable, the ICC’s Statute may impose (additional) obligations in relation to situations meeting the relevant threshold of application for a NIAC established in that instrument.²⁵⁷ Finally, as briefly referenced above, where applicable, additional conventions—concerning, for example, cultural property, certain weapons, protective emblems, or explosive remnants of war—may impose obligations in relation to NIAC.²⁵⁸

253. Article 1(1) AP II.

254. See also Article 1(4) CCW Protocol II (providing that “[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State”).

255. See Int’l Comm. Red Cross, *Additional Protocol II: States Parties*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 <<https://perma.cc/78MM-CUWP>>.

256. According to the ICJ, the rules of Common Article 3 “constitute a minimum yardstick” in both NIACs and IACs and also reflect “elementary considerations of humanity.” *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 54, 114 (June 27) (citations omitted).

257. Articles 8(2)(c)–(f) ICC Statute. In principle, in a NIAC involving a state party that is not a contracting party to AP II but that is subject to the jurisdiction of the ICC’s Statute, the state would be bound in respect of a relevant NIAC not only by Common Article 3 and customary rules applicable in NIAC but also by relevant provisions of the ICC’s Statute (such as Articles 8(2)(e)(ii) and (iv) of the ICC Statute concerning certain war crimes).

258. See Article 19 1954 Cultural Property Conv. and Article 22(1) 1999 (Second) Protocol; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, 54th Sess., U.N. Doc. A/RES/54/263 (May 25, 2000); 2001 CCW Amendment to Article 1, adopted Dec. 21, 2001, UN Doc. CCW/CONF.II/2; Article 1(2) CCW Protocol II; Article 1(3) CCW

Approach of the ICTY and ICC concerning the Existence (or Not) of a NIAC²⁵⁹

In 1995, the Appeals Chamber of the ICTY held, with respect to the material, temporal, and geographic scope of application of IHL to “internal conflicts”:

[T]hat an [internal] armed conflict exists whenever there is ... *protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*. [IHL] applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until ..., in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, [IHL] continues to apply in ..., in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict.... Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the *intensity requirements* applicable to ... internal armed conflicts.²⁶⁰

Subsequently, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have elaborated factors and indicators aimed at ascertaining, in those tribunals’ view, the two cumulative constituent elements necessary to determine the existence of a NIAC: the existence of a sufficiently organized armed group (or groups) and the existence of sufficiently intense hostilities. The most exhaustive such analysis came in the *Boškoski* Trial Judgment in the ICTY. Building on a long line of ICTY cases, that Trial Chamber identified indicative factors for the “organizational” criterion and for the “intensity” criterion.²⁶¹

What about the “protracted” portion of the ICTY Appeals Chamber’s formulation to determine the existence of a NIAC (that is, “*protracted* armed violence”)?²⁶² That “protracted” element—despite “protracted” meaning, in general usage, lengthened, extended, or prolonged *in time*²⁶³—appears to have been subsequently interpreted

Protocol V; Article 1(2) AP III.












259. For an overview of the approach to the existence of a NIAC developed in the jurisprudence of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the ICC, see Noëlle Quénivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES* 44–56 (Derek Jinks, Jackson N. Maogoto, and Solon Solomon eds., 2014).

260. *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70 (emphasis added). The U.S. Department of Defense’s *Law of War Manual* cites this paragraph in relation to the “range of views on what constitutes an ‘armed conflict not of an international character’ for” the purpose of applying the obligations in Common Article 3 of the 1949 Geneva Conventions. *LAW OF WAR MANUAL*, *supra* note 44, at § 3.4.2.2 n.74. This *Tadić* formulation concerning the existence of a NIAC is referenced in a French military manual. See FRENCH MIN. OF DÉF., *MANUEL DE DROIT DES CONFLICT ARMÉS* 34 (2012), http://usnwc.libguides.com/ld.php?content_id=2998121 <<https://perma.cc/QV35-EJMJ>>. And part of that formulation is referenced by Judge Simma, of the ICJ, in his Separate Opinion in *Democratic Republic of the Congo v. Uganda*. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 341 (Dec. 19), ¶ 23 (Sep. Op. Judge Simma).

261. See the analysis and citations in *Boškoski*, Trial Judgement, *supra* note 4, at ¶¶ 177–78, 183, 199–203, 206.

262. *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70 (emphasis added).

263. See *Protracted* adj., OXFORD ENGLISH DICTIONARY (online ed., 2016).

SUMMARY TABLE Elements Identified in International Criminal Tribunals concerning the Existence of a Non-International Armed Conflict		
Cumulative Criteria	Factors	Example (though neither necessary nor sufficient) indicators
Organization of the Non-State Armed Group(s)	The existence of a command structure 	<ul style="list-style-type: none"> • The existence of headquarters • The existence of a general staff or high command • The existence of internal regulations • The issuing of political statements or communiqués • The existence of spokespersons • Identifiable ranks and positions
	The existence of military (operational) capacity 	<ul style="list-style-type: none"> • The ability to define a unified military strategy • The ability to use military tactics • The ability to carry out large-scale or coordinated military operations • The control of certain territory and territorial division into zones of responsibility
	The existence of logistical capacity 	<ul style="list-style-type: none"> • The existence of supply chains (to gain access to weapons and other military equipment) • The ability of troop movement • The ability to recruit and train personnel
	The existence of an internal disciplinary system and the ability to implement IHL 	<ul style="list-style-type: none"> • The existence of disciplinary rules or mechanisms within the group • Training in such rules
	The ability of the group to speak with one voice 	<ul style="list-style-type: none"> • The capacity to act on behalf of its members in political negotiations • The capacity to conclude cease-fire agreements
Intensity of Hostilities (on the “protracted” characteristic, see the report text)	The use of armed forces 	<ul style="list-style-type: none"> • The quantity of troops involved • The increase in the number and type (e.g., army, air force, or navy) of government forces and the need for mobilization
	The attacks 	<ul style="list-style-type: none"> • The seriousness of attacks and whether there has been an increase in armed clashes • The spread of clashes over territory and over a period of time • Damage and casualties suffered by the fighting parties
	The type of actions 	<ul style="list-style-type: none"> • The extent to which towns are besieged or supply routes are blocked • The closure of roads
	The type of weapons, ammunition, and other military equipment used by the parties 	<ul style="list-style-type: none"> • Use of heavy weapons, such as tanks and other heavy vehicles
	Effects on the civilian population 	<ul style="list-style-type: none"> • Number of casualties • Number of civilians forced to flee from the combat zones • The extent of destruction
	Involvement of the U.N. Security Council and other external actors 	<ul style="list-style-type: none"> • Whether resolutions have been passed on the situation • Whether there were other external actors

largely as a factor to consider when assessing the intensity-of-hostilities criterion, rather than as an independent criterion.²⁶⁴

A few years after the seminal ICTY Appeals Chamber's decision in *Tadić*, states—in drafting the portions of the ICC's Statute pertaining to war crimes committed in relation to a NIAC—used language and concepts seemingly drawn from Common Article 3, from AP II, and from that *Tadić* decision. Yet, somewhat confusingly, the text of the ICC's Statute articulates two different sets of formulations in distinguishing NIACs (in which certain war crimes may be committed) from certain other situations (in which war crimes under the ICC's Statute cannot be committed, due to the lack of existence of a NIAC). According to the ICC's Statute, those certain other situations—in which NIAC war crimes cannot arise under the ICC's Statute—are “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”²⁶⁵ (Recall that AP II expressly distinguishes such situations, to which AP II does not apply, from NIACs under its threshold of application.²⁶⁶ Common Article 3 does not contain that explicit distinction but has been interpreted, at times, as excluding such situations from its scope of application.²⁶⁷ And recall further that, in general, war crimes may be committed only in connection with an armed conflict, whether the conflict is of an international or non-international character.²⁶⁸)

The first set of NIAC war crimes enumerated under the ICC's Statute consists of certain “serious violations” of Common Article 3. Under the relevant provision of the ICC's Statute—with that provision mirroring the formulation of a NIAC laid down in Common Article 3—those violations may occur “[i]n the case of an armed conflict not of an international character.”²⁶⁹ The second set of NIAC war crimes enumerated under the ICC's Statute consists of “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”²⁷⁰ Confusion might arise, in principle, where the ICC's Statute distinguishes the NIACs in which this second set of NIAC war crimes under the Court's jurisdiction may occur from situations of internal disturbances and tensions that do not fall under the ICC's NIAC war-crimes jurisdiction. Under the ICC's Statute, this second set of NIAC war crimes may arise only in relation to “armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and

264. See *Boškoski*, Trial Judgement, *supra* note 4, at ¶ 175 (stating that “care is needed not to lose sight of the requirement for protracted armed violence in the case of an internal armed conflict, *when assessing the intensity of the conflict*”) (emphasis added); see also *id.* at ¶ 183 (stating that certain cases examined by the Chamber “demonstrate that national courts have paid particular heed to the *intensity, including the protracted nature, of violence* which has required the engagement of the armed forces in deciding whether an armed conflict exists”) (emphasis added). See ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 142 (2010); Bartels, *When NIACs End*, *supra* note 13, at 312–313.

265. Article 8(2)(d) and (f) ICC Statute. See also *supra* notes 253–54 and corresponding text.

266. See Article 1(2) AP II.

267. See, e.g., GC I 2016 COMMENTARY, *supra* note 68, at ¶ 386.

268. See *supra* note 34.

269. Article 8(2)(c) ICC Statute.

270. *Id.* at Article 8(2)(e).

organized armed groups or between such groups.”²⁷¹

What did the drafters of the ICC’s Statute mean by “protracted armed conflict” in formulating one of the types of NIAC for which the Court could exercise jurisdiction for war crimes? Did they mean to imply a distinction with the “protracted armed violence” formulation of the ICTY Appeals Chamber in *Tadić*? As noted above, certain ICTY decisions deemphasize the temporal portion of the “protracted armed violence” formulation concerning the determination of the existence of a NIAC.²⁷² Currently, it is difficult to ascertain whether ICC judges are moving in the direction of adopting that approach or, alternatively, might be more prone to distinguishing between the intensity and the protracted characteristics (and requiring the existence of both to find the existence of a NIAC).²⁷³

In its emerging case law concerning what constitutes sufficient organization of an armed group, as an element that is necessary to establish the existence of a NIAC, ICC judges have utilized an approach that is similar to the ICTY. For instance, in the *Lubanga* and *Katanga* cases, the relevant Trial Chambers of the ICC recognized that the ICTY-enumerated factors concerning the organization of armed groups are of potential relevance.²⁷⁴ Those same ICC chambers also recognized (also in line

271. Article 8(2)(f) (emphasis added).

272. See *supra* notes 262–64 and corresponding text.

273. Compare Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute, ICC Trial Chamber III, ICC-01/05-01/08, Mar. 21, 2016, ¶ 139 [hereinafter, “*Bemba*, Trial Judgment”] (stating that “[t]he Chamber notes that the concept of ‘protracted conflict’ has not been explicitly defined in the jurisprudence of this Court, but has *generally been addressed within the framework of assessing the intensity of the conflict*. When assessing whether an armed conflict not of an international character was protracted, however, *different chambers of this Court emphasised the duration of the violence as a relevant factor*. This corresponds to the approach taken by chambers of the ICTY. The Chamber follows this jurisprudence”) (emphasis added; citations omitted) with Prosecutor v. Germain Katanga, Judgment pursuant to [A]rticle 74 of the Statute, ICC Trial Chamber II, ICC-01/04-01/07, Mar. 7, 2014, ¶ 1217 [hereinafter, “*Katanga*, Trial Judgment”] (stating that, “[w]ith specific reference to its foregoing review of the attacks that followed [the] assault on Bogoro, the Chamber finds that the armed conflict was *both protracted and intense* owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003. Thus, in the Chamber’s view, the evidence before it suffices to fulfil the *intensity of the conflict requirement*”) (emphasis added; internal citation omitted).

274. Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC Trial Chamber I, ICC-01/04-01/06-2842, Mar. 14, 2012, ¶ 537 [hereinafter, “*Lubanga*, Trial Judgment”] (stating that, “[w]hen deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is *potentially* relevant: the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the [ICC’s] Statute that the armed group was ‘organized’”) (emphasis added; citations omitted); *Katanga*, Trial Judgment, *supra* note 273, at ¶ 1186 (stating that, “[f]or the purpose of determining whether an armed conflict was not of an international character, it must be decided whether a body was an organized armed group, and it *may be relevant to consider the following non-exhaustive list of factors*: the force or group’s internal hierarchy; its command structure and the rules applied within it; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. None of these factors are individually determinative. Accordingly,

with the ICTY approach) that, for a NIAC to exist in terms of the ICC's Statute, the relevant organized armed groups need not exercise control over territory nor be under responsible command.²⁷⁵ However, ICC Trial Chamber III, in the *Bemba* case, adds that the possibility to impose discipline is a factor to be considered.²⁷⁶

Approach of the Inter-American Human Rights System concerning the Existence (or Not) of a NIAC

In 1997, in *La Tablada*, the Inter-American Commission of Human Rights found that an attack that lasted around 30 hours and that was directed at a military base in Argentina constituted a non-international armed conflict to which IHL applied.²⁷⁷ In doing so, the Commission distinguished a NIAC from an internal disturbance based on “the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of violence attending the events in question.”²⁷⁸ The fighting at issue in *Tablada* appears to be the shortest duration of hostilities that an international body has characterized as a non-international armed conflict to which IHL applied. Subsequent to *Tablada*, the Inter-American Court of Human Rights has largely demurred on so expressly analyzing and applying IHL.²⁷⁹

since article 8(2)(f) of the [ICC's] Statute requires only that the armed group be ‘organized’, the Chamber holds that *some degree of organisation* suffices to establish the existence of an armed conflict and recalls that those factors are to be assessed case-by-case”) (emphasis added; citations omitted).

275. *Lubanga*, Trial Judgment, *supra* note 274, at ¶ 536 (noting “that Article 8(2)(f) of the [ICC's] Statute only requires the existence of a ‘protracted’ conflict between ‘organised armed groups’. It does not include the requirement in Additional Protocol II that the armed groups need to ‘exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations’. It is therefore *unnecessary for the prosecution to establish that the relevant armed groups exercised control over part of the territory of the State*. Furthermore, Article 8(2)(f) [of the ICC's Statute] does not incorporate the requirement that the organised armed groups were ‘under responsible command’, as set out in Article 1(1) of Additional Protocol II. Instead, the ‘organized armed groups’ must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence”) (emphasis added; citations omitted); *see also Katanga*, Trial Judgment, *supra* note 273, at ¶ 1186 (underscoring “that *exertion of control over a part of the territory by the groups concerned is not required*. Similarly, article 8(2)(f) [of the ICC's Statute] *does not specify responsible command* as envisioned by article 1(1) of Additional Protocol II to the Geneva Conventions”) (emphasis added; citations omitted).

276. *Bemba*, Trial Judgment, *supra* note 273, at ¶ 136.

277. *La Tablada*, *supra* note 69, at ¶ 155.

278. *Id.* The Commission further stated that, “[m]ore particularly[,] the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective.” *Id.* The Commission discussed the existence of an armed conflict partly in relation to the existence of “combatants” and the protections owed: “When civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in the fighting [...] they thereby become legitimate military targets.” *Id.* at ¶ 177.

The U.S. Department of Defense's *Law of War Manual* (Dec. 2016) cites to *Tablada* in relation to the “range of views on what constitutes an ‘armed conflict not of an international character’ for” the purpose of applying the obligations in Common Article 3 of the 1949 Geneva Conventions, as well as in relation to a possible “helpful rule of thumb” to identify activities that are subject to the law of war based on an assessment that “parties are, in fact, engaged in activities that the law of war contemplates (e.g., detention of enemy military personnel without criminal charge, bombardment of military objectives).” *LAW OF WAR MANUAL*, *supra* note 44, at § 3.4.2.2 n.74 and n.77.

279. *See Shana Tabak, Armed Conflict and the Inter-American Human Rights System: Application or*

IHL TREATY PROVISIONS CONCERNING THE END OF CONFLICT IN RELATION TO NIAC

IHL Treaty Provisions concerning the End of Obligations That are Established in Common Article 3

Common Article 3 does not contain an express provision concerning what constitutes the termination of an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” to which it applies. (During the drafting of AP II, an amendment was proposed that the application of that protocol should cease “upon the general cessation of military operations,” but the delegates did not adopt that proposal.²⁸⁰)

Common Article 3—unlike AP II²⁸¹—does not lay down an express obligation extending beyond the end of the relevant NIAC any of the protections it establishes. To be certain, Common Article 3(1) does expressly provide that “[certain enumerated] acts are and shall remain prohibited *at any time*.”²⁸² Yet, for various reasons—including Common Article 3’s scope of application (limited as it is to situations of NIAC “*occurring* in the territory of one of the High Contracting Parties”²⁸³)—it would seem that that “at any time” formulation is best interpreted as meaning “at any time” *during an ongoing NIAC* to which Common Article 3 applies. The ICRC recently set out a broader interpretation: in its view, some of Common Article 3’s protections continue to bind parties beyond the end of the relevant NIAC.²⁸⁴ Yet, in doing so, the ICRC does not appear to have provided a sufficient international-legal justification as to why, once the relevant armed conflict had terminated, Common Article 3 would continue to be applicable.²⁸⁵

Interpretation of International Humanitarian Law, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (Derek Jinks, Jackson N. Maogoto, and Solon Solomon eds., 2014); Christina M. Cerna, *The History of the Inter-American System’s Jurisprudence as Regards Situations of Armed Conflict*, 2 J. INT’L HUMAN. LEGAL STUD. 3 (2011); Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, “War” in the Jurisprudence of the Inter-American Court of Human Rights, 33 HUM. RTS. Q. 148 (2011).

280. See COMMENTARY ON THE APs, *supra* note 68, at 1360 (citation omitted).

281. AP II extends some of its protective obligations beyond the end of the relevant NIAC. See Articles 2(1) and 25(1) AP II.

282. Emphasis added.

283. Emphasis added.

284. See GC I 2016 COMMENTARY, *supra* note 68, at ¶ 501 (stating that “[p]ersons protected under common Article 3, even after the end of a [NIAC], continue to benefit from the article’s protection as long as, in consequence of the armed conflict, they are in a situation for which common Article 3 provides protection”).

285. In principle, such a justification could be grounded, to the extent Common Article 3 is addressed as a matter of treaty law, in, where available, subsequent state practice in the application of Common Article 3 that establishes the agreement of the parties regarding its interpretation. See Article 31(3)(b) VCLT. Where the protective obligations embodied in Common Article 3 are addressed in terms of reflecting customary international law, sufficient state practice and *opinio juris* would be necessary to evince. Yet the ICRC does not provide sufficient evidence of any such subsequent state practice or *opinio juris* concerning the extension of the temporal scope of application of Common Article 3 beyond the termination of the relevant NIAC. The ICRC references an analysis of a Commission of Experts convened by the ICRC in 1962. See GC I 2016 COMMENTARY, *supra* note 68, at ¶ 498. But that analysis is not sufficient to establish a

IHL Treaty Provisions concerning Deprivation of or Restrictions on Liberty for Reasons related to the End of a NIAC²⁸⁶

With respect to a NIAC to which it applies, AP II contains provisions that extend the temporal scope of applicability of certain protective obligations beyond the termination of the conflict. Article 2(1) of AP II provides that, “[a]t the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted *after the conflict* for the same reasons, shall enjoy the protection of Articles 5 and 6 [of AP II] *until the end of such deprivation or restriction of liberty*.”²⁸⁷ The protocol does not, however, define what constitutes “the end of the armed conflict” in the sense of Article 2(1) of AP II. Under Article 25(1) of AP II, “[p]ersons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol *until their final release*.”²⁸⁸

IHL Treaty Provisions concerning Amnesty in relation to the End of NIAC

With respect to NIACs to which AP II applies, under Article 6(5) of that protocol, “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”²⁸⁹ The protocol does not define what constitutes “the end of hostilities” in the sense of Article 6(5) of AP II.

IHL Treaty Provisions concerning End-of-NIAC-related Obligations pertaining to Mines, Booby-traps, and Certain Other Devices

As noted above, two provisions in Protocol II of the CCW (as amended) expressly affix temporal formulations—especially “the cessation of active hostilities,” though without defining the phrase—to obligations concerning mines, booby-traps, and certain other devices. In particular, Article 9(2) of that instrument affixes various recording-related obligations to the period “immediately after the cessation of active hostilities.”²⁹⁰ And Article 10(1) of Protocol II of the CCW (as amended) provides

binding interpretation concerning the extension of the temporal scope of application of certain protections established in Common Article 3 beyond the end of the conflict. The ICRC also references provisions in AP II that extend, where applicable, some of the protective obligations established in AP II beyond the end of the NIAC to which all of AP II applies. But that reference to AP II does not suffice, either—not least because, as noted above, AP II expressly purports to “develop[] and supplement[]” Common Article 3 and to do so “without modifying [Common Article 3’s] existing conditions of application.” Article 1(1) AP II. 286. See generally Scholdan, *The End of Active Hostilities*, *supra* note 13.

287. Emphasis added. See COMMENTARY ON THE APS, *supra* note 68, at 1358 (stating that Article 2(2) of AP II “specifies *ratione temporis* the legal protection of persons deprived of their liberty, who will continue to enjoy the fundamental guarantees of humane treatment and of judicial guarantees *after the end of hostilities, not only if they were already detained, but also if they were arrested after the conflict came to an end*. This rule reduces the risk of arbitrary behaviour by the victorious party”) (emphasis added).

288. Emphasis added.

289. Emphasis added.

290. Article 9(2) CCW Protocol II; see *supra* note 231.

that, “[w]ithout delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with” Articles 3(2) and 5 of that instrument.

IHL Treaty Provisions concerning End-of-NIAC-related Obligations pertaining to Explosive Remnants of War

As noted above, Protocol V of the CCW concerns explosive remnants of war.²⁹¹ Certain obligations imposed in that agreement—including with respect to clearance, removal, or destruction of explosive remnants of war²⁹² and with respect to recording, retaining, and transmission of information²⁹³—arise “after the cessation of active hostilities.” However, Protocol V of the CCW does not define what constitutes “the cessation of active hostilities.”²⁹⁴

IHL Treaty Provisions concerning Denunciation or Withdrawal in relation to NIAC

As noted above, the denunciation provisions in GCs I–IV (which Common Article 3 forms part of) establish formulations concerning the temporal end of application of the relevant convention(s) in accordance with a valid denunciation.²⁹⁵ However, as emphasized above, to the extent the substantive provisions of the relevant IHL treaty are accepted as representing customary international law, denunciation of or withdrawal from that treaty would not impair the duty of the state to fulfill the obligations to which the state is otherwise subject, including through customary international law.²⁹⁶ According to the ICJ, the rules of Common Article 3 “constitute a minimum yardstick” in both NIACs and IACs and reflect “elementary considerations of humanity.”²⁹⁷

Under Article 25(1) of AP II, “[i]n case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation.” Yet, pursuant to that same article, if, “on the expiry of six months, the denouncing Party is engaged in the situation referred to in [article 1 of AP II], the denunciation shall not take effect *before the end of the armed conflict*.”²⁹⁸ As noted above, AP III, which concerns the adoption of an additional protective emblem, including in relation to NIAC, contains similar provisions.²⁹⁹ As also mentioned above, Article 9(1) of the CCW lays down provisions concerning denunciation.³⁰⁰

291. Protocol V of the CCW applies in relation to IACs and NIACs; *see* Article 1(3) CCW Protocol V.

292. Article 3 CCW Protocol V; *see supra* note 234.

293. Article 4(2) of the CCW Protocol V; *see supra* note 235.

294. With respect to the formulation “the cessation of active hostilities” in the sense of Article 118(1) of GC III, concerning release of prisoners of war, *see supra* Section 4.

295. *See supra* notes 237–38 and corresponding text.

296. *See supra* note 236.

297. *See supra* note 256.

298. Emphasis added.

299. Article 14(1) AP III.

300. *See supra* note 242 and corresponding text.

PEACE AGREEMENTS AND PEACEFUL SETTLEMENTS

Agreements between the Parties

In relation to NIAC, peace agreements are commonly conceived as agreements concluded, with a view to bringing the conflict to an end, between a non-state party to a NIAC, on one hand, and either one or more states or one or more non-state parties, on the other hand.³⁰¹ Such agreements are distinguishable from peace treaties *stricto sensu*—which, as mentioned above, have a primary function of terminating a “state of war” in the legal sense—because the state-of-war concept is foreign to NIACs.³⁰²

Christine Bell argues that discerning whether a particular peace agreement constitutes a binding international agreement can be a tautological exercise: “[t]he tautology arises because a claim to international subjectivity ... involves examining what rights, powers, duties, and immunities the actors in question are accorded on the international plane, including whether they are permitted to sign treaties or international agreements.”³⁰³ Yet the primary “evidence of such permission may be the existence of an internationalized peace agreement itself.”³⁰⁴ As a consequence, “[r]ecognizing peace agreements as international agreements ... seems to require the non-state group and the agreement to ‘bootstrap’ each other into the international legal realm.”³⁰⁵ For his part, Dinstein avers that a peace accord between an incumbent government and non-state actors does not constitute a treaty and that (contrary to Bell³⁰⁶), unless that accord leads to secession, it is not binding on the international-legal plane and the non-state signatories do not become subjects of international law.³⁰⁷

ICTY Jurisprudence concerning a “Peaceful Settlement”

In 1995, in *Tadić*, the ICTY Appeals Chamber held in relation to “internal conflicts” that IHL “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities *until ... a peaceful settlement is achieved*.”³⁰⁸ Until that moment, the Court held, IHL “continues to apply in ..., in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”³⁰⁹ The ICTY Appeals Chamber also emphasized, more generally, that “the temporal and geographical scope of ... internal ... armed conflicts extends beyond the exact time and place of hostilities.”³¹⁰ In 2008, in the original *Haradinaj* trial judgement,³¹¹ an ICTY Trial Chamber alluded to that

301. See generally Bell, *Peace Agreements*, *supra* note 13; Kleffner, *Peace Treaties*, *supra* note 86.

302. See Kleffner, *Peace Treaties*, *supra* note 86, at ¶ 10.

303. Bell, *Peace Agreements*, *supra* note 13, at 384 (citations omitted).

304. *Id.* (citations omitted).

305. *Id.*

306. See Bell, *Peace Agreements*, *supra* note 13, at 381.

307. See DINSTEIN, *NIACs IN INTERNATIONAL LAW*, *supra* note 41, at 49.

308. *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70 (emphasis added).

309. *Id.*

310. *Id.* at ¶ 67 (emphasis added).

311. See Prosecutor v. Ramush Haradinaj *et al.*, Public Judgement with Confidential Annex, ICTY Trial

peaceful-settlement test. That Chamber held that, in the circumstances of the case, “since according to the *Tadić* test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period.”³¹²

The provenance of the term “peaceful settlement,” as used in this *Tadić* formulation, is unclear. Perhaps it was drawn from or inspired by one prominent historical use of the term “peaceful settlement” that arose in relation to an IAC (not a NIAC) on the Korean Peninsula: The *Military Armistice in Korea and Temporary Supplementary Agreement* signed on July 27, 1953. By its terms, that agreement aimed to, among other things, “insure a complete cessation of hostilities and of all acts of armed force in Korea *until a final peaceful settlement is achieved*.”³¹³ (To date, no such “final peaceful settlement”—at least not in the form of a peace treaty or a final-settlement agreement—has been achieved.³¹⁴)

Gabriella Venturini argues that “[t]he classic method of reaching a ‘peaceful settlement’ [in relation to a NIAC] is through a formal agreement sanctioning the definitive cessation of hostilities.”³¹⁵ She cites the following as examples of such agreements:

- The Peace Agreement signed by the Government of El Salvador and the Frente Farabundo Martí in Mexico on January 16, 1992;³¹⁶
- The Rome General Peace Agreement of October 4, 1992 between the Frelimo Government of Mozambique and the opposition forces of Renamo;³¹⁷
- The Agreement on the Implementation, Compliance, and Verification Timetable for the Peace Agreements and the Agreement for a Firm and Lasting Peace of December 29, 1996 by the Peace Commission of the Government of Guatemala and the General Command of the Unidad Revolucionaria Nacional Guatemalteca;³¹⁸
- The Lomé Peace Agreement of July 7, 1999 between the elected Government of Sierra Leone and the Revolutionary United Front;³¹⁹ and
- The Arusha Peace and Reconciliation Agreement for Burundi of August 28, 2000.³²⁰

Chamber II, IT-04-84bis-T, Nov. 29, 2012, ¶¶ 3–4, 682–85 (citations omitted) [hereinafter, “*Haradinaj*, Retrial Judgement”].

312. Prosecutor v. Ramush Haradinaj *et al.*, Judgement, ICTY Trial Chamber I, IT-04-84-T, Apr. 3, 2008, ¶ 100 [hereinafter, “*Haradinaj*, Trial Judgment”].

313. Armistice in Korea, *supra* note 144. See *supra* Section 4 concerning the status under international law of armistices.

314. See *supra* note 144.

315. Venturini, *Temporal Scope*, *supra* note 13, at 62.

316. UN Doc. A/46/863-S/23504, Annex I.

317. UN Doc. S/24635, Oct. 8, 1992.

318. UN Doc. A/51/796-S/1997/114, Annexes I and II.

319. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999.

320. See Arusha Peace and Reconciliation Agreement for Burundi (2000). Venturini notes, however, that “[t]he Arusha Agreement did not prevent the resumption of hostilities, ending with the Global Ceasefire

Yet, under the rationale that the existence of a NIAC depends on the *fact* of protracted armed violence between states and organized armed groups or between such groups, Kleffner argues that “the mere adoption of a peace agreement, while indicating a certain intention of the parties to a [NIAC] to end that conflict, does not put an end to the existence of a [NIAC] and the applicability of the international legal framework pertaining to it.”³²¹ Thus, with respect to the *Tadić* formulation that the law of NIAC applies “until ... a peaceful settlement is achieved,” Kleffner avers that that formulation “only holds true to the extent that the ‘peaceful settlement’ is not a matter of mere agreement, but is also an accurate description of the factual situation on the ground.”³²² More pointedly, Rogier Bartels argues that the formulation is too strict for NIAC and is not supported by IHL.³²³

In any event, numerous ICTY Trial Chambers and the Appeals Chamber have endorsed the *Tadić* “until ... a peaceful settlement is achieved” formulation.³²⁴ Also, in outlining sequential phases concerning the end of armed conflict in Sierra Leone, the Appeals Chamber of the Special Court for Sierra Leone utilized the “peaceful settlement” formulation—though without reference or citation to the ICTY—in the sense that “[t]he Peace Agreement Phase [which, according to the Appeals Chamber, comes after ‘the phase of armed conflict’ and which precedes the ‘Justice Phase’] signifies the end of the armed conflict by means of a peaceful settlement.”³²⁵

Agreement between the Transitional Government of Burundi and the National Council for the Defence of the Democracy-Forces for the Defence of Democracy signed in Dar-es-Salaam on 16 November 2003.” Venturini, *Temporal Scope*, *supra* note 13, 62 n.78 (citation omitted).

321. Kleffner, *Peace Treaties*, *supra* note 86, at ¶ 10.

322. *Id.* See also DINSTEIN, NIACs IN INTERNATIONAL LAW, *supra* note 41, at 48 (giving, as one of the “several basic scenarios” of how a NIAC may come to an unequivocal end, the example whereby “[a] compromise scheme between the conflicting positions of the parties to the NIAC is agreed upon and implemented. An agreement by itself may be the light of a false dawn, so it is implementation that ultimately counts”) (emphasis added).

323. Bartels, *When NIACs End*, *supra* note 13, at 301. Also, as noted above, Quéguiner characterizes the ICTY Appeals Chamber’s formulations concerning the end of armed conflict and the termination of IHL in relation to conflict as an attempt “to shed light — if only a little — on this complex issue.” See *supra* note 244.

324. See *Prosecutor v. Dragoljub Kunarac et al.*, Judgement, ICTY Appeals Chamber, IT-96-23 and IT-96-23/1-A, June 12, 2002, ¶ 57 (citations omitted); *Boškoski*, Trial Judgement, *supra* note 4, at ¶ 293 (citations omitted); *Haradinaj*, Retrial Judgement, *supra* note 311, at ¶ 396 (citations omitted). Part of that formulation is referenced by Judge Simma, of the ICJ, in his Separate Opinion in *Democratic Republic of the Congo v. Uganda*. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 341 (Dec. 19), ¶ 23 (Sep. Op. Judge Simma). In the section on the difference between internal disturbances (to which IHL does not apply) and “internal armed conflicts” (to which IHL does apply), the U.K. Ministry of Defence’s *The Joint Service Manual of the Law of Armed Conflict* notes and excerpts the *Tadić* formula, including the “peaceful settlement” formulation. See U.K., JOINT SERVICE MANUAL, *supra* note 105, at ¶ 15.3.1. Yet it is not clear if thereby that *Manual*’s authors meant necessarily to endorse that approach. As noted above, in a separate part of that *Manual* (the chapter on “The Applicability of the Law of Armed Conflict”), under the heading of “The Beginning and End of Application,” the *Manual* states that “[t]he law of armed conflict applies from the beginning of an armed conflict until the general close of military operations.” See *supra* note 149 and corresponding text. Note that the paragraph in which this excerpt on the beginning and end of application of the law of armed conflict appears seems to pertain only to IAC standards; but no such express qualification is made, even though this paragraph immediately follows an overview of differences between legal concepts underpinning IACs and NIACs.

325. *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Decision on Challenge to Jurisdiction:

ICC Jurisprudence

None of the sources of law that the ICC shall apply “[i]n the first place”³²⁶—the Court’s Statute, its Elements of Crimes, or its Rules of Procedure and Evidence—contains a provision expressly delimiting at what point the temporal scope of situations of NIAC in respect of which the ICC may exercise jurisdiction terminates. “In the second place,” under the ICC’s Statute, the Court shall apply, “where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”³²⁷ Accordingly, it has fallen to ICC judges to identify and interpret relevant parameters concerning the end of a NIAC falling under the Court’s jurisdiction.

Recently, the Court outlined some of those parameters. In its March 2016 judgment finding Jean-Pierre Bemba Gombo guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging), Trial Chamber III adopted the “peaceful settlement” formulation articulated in *Tadić* concerning the end of—or, at least, the end of applicability of IHL to—a NIAC.³²⁸

Lomé Accord Amnesty, SCSL Appeals Chamber, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR 72(E)), Mar. 13, 2014, ¶ 18 (and stating that “[o]ne legal consequence of that phase is that international humanitarian law would normally cease to be applicable to any act of violence in the peace period unless, notwithstanding what would have been regarded as a peaceful resolution, one party or both parties, in breach thereof, continued the armed conflict. Presumably, it is in further protection of the peace process that the competence of the Special Court includes in Article 1(1) of the Statute the prosecution of ‘those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.’ Thereby, impunity is denied to any such person, notwithstanding that there had been a peace agreement which constituted some sort of peaceful resolution of the conflict”). *Id.*

326. Article 21(1)(a) ICC Statute.

327. *Id.* at Article 21(1)(b); *see also id.* at Article 21(1)(c) (providing that, “[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”).

328. *Bemba*, Trial Judgment, *supra* note 273, at ¶ 141 (citing to *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70). That ICC Trial Chamber held that such a “peaceful settlement” does not, contrary to what the defense had argued, “reflect only the mere existence of an agreement to withdraw or a declaration of an intention to cease fire.” *Id.* (citations omitted).

SUMMARY TABLE IHL Treaty Provisions and Certain International Criminal Tribunals' Formulations concerning the End of Non-International Armed Conflict		
Issue	Source or Authority	Provision(s)
Persons deprived of liberty in relation to armed conflict	Common Article 3 to GCs I–IV (1949)	No express temporal provision
	AP II (1977)	" At the end of the armed conflict , all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty." (Art. 2(1) AP II); "Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release ." (Art. 25(1) AP II)
General applicability of IHL and general termination of war-crimes period	ICTY (1995) & ICC (2016)	IHL continues to apply " until ... a peaceful settlement is achieved " (ICTY, <i>Tadić</i> , 1995, ¶ 70; endorsed by ICC, <i>Bemba</i> , 2016, ¶ 141)
Amnesties	AP II (1977)	" At the end of hostilities , the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." (Art. 6(5) AP II)
Minefields, mines and booby-traps	CCW Protocol II (as amen. 1996)	Various recording-related obligations to the period " immediately after the cessation of active hostilities " (Art. 9(2) CCW Protocol II); "[w]ithout delay after the cessation of active hostilities , all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with" Articles 3(2) and 5 (Art. 10(1) CCW Protocol)
Explosive remnants of war	CCW Protocol V (2003)	" After the cessation of active hostilities and as soon as feasible , each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control." (Art. 3(2) CCW Protocol V); " After the cessation of active hostilities and as soon as feasible , each High Contracting Party and party to an armed conflict shall take [certain] following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war" (Art. 3(3) CCW Protocol V); certain Contracting Parties and parties to an armed conflict " shall, without delay after the cessation of active hostilities and as far as practicable , subject to these parties' legitimate security interests, make available certain information to the party or parties in control of the affected area" (Art. 4(2) CCW Protocol V)
Denunciation	Common Article 3 to GCs I–IV (1949)	"a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated ." (Articles 63(3)/62(3)/142(3) GCs I–III; see also article 158(3) GC IV)
	AP II (1977)	"If ... on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict . Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release ." (Art. 25(1) AP II)
	CCW (1980)	"If ... on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the person protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions ." (Art. 9(2) CCW)

6

CHALLENGING SCENARIOS

INTRODUCTION

This section sketches some of the diverse contemporary situations that might pose challenges to ending, and to discerning the end of, armed conflict under the relevant international-legal framework of armed conflict. Examples are broken down along the following conceptual lines:

- Conflict classification and party identification;
- Non-recognition of armed conflict;
- Status of and adherence to agreements between adverse parties;
- Long-term enmity marked by intermittent violence; and
- State responses to terrorism.

CONFLICT-CLASSIFICATION AND PARTY-IDENTIFICATION CHALLENGES

To varying degrees and in diverse manifestations, recent or ongoing armed conflicts underscore some of the difficulties in precisely delineating how many armed conflicts simultaneously exist, the international-legal classification of those conflicts, the parties to those conflicts, and the international responsibility of relevant states in relation to those conflicts. In turn, those often-interconnected complications may make it more difficult to accurately evaluate when the relevant conflict has terminated and when the accompanying international-legal framework of armed conflict no longer applies in relation to it.

A recurrent threshold challenge is obtaining—amid ongoing hostilities or even after they cease—suitably reliable and sufficiently comprehensive information to make a legal analysis. For instance, unraveling the complexities of the Second Congo War has proved particularly challenging.³²⁹ During many contemporary conflicts, relationships between parties shift during the conflict, as in the DRC, further complicating fact-finding.³³⁰

329. See Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, in *INTERNATIONAL LAW AND CLASSIFICATION OF CONFLICT* 176 (Elizabeth Wilmschurst ed., 2012) (footnotes omitted).

330. *Id.* (footnotes omitted).

The existence of simultaneous overlapping or parallel armed conflicts—as well as challenges in establishing control by one party over another for purposes of conflict classification or of attribution of actions and responsibilities—might make it difficult to detect the end of a particular conflict. In the Second Congo War, Louise Arimatsu notes, “[n]ot only were there an extraordinary number of States and non-state armed groups engaged in the fighting but there were multiple international and non-international conflicts being fought concurrently on the Congo’s vast territory.”³³¹ Similar complications have arisen in Afghanistan,³³² Iraq,³³³ Lebanon,³³⁴ South Ossetia,³³⁵ Syria,³³⁶ and Ukraine,³³⁷ among others.

At least three sets of interconnected legal and factual issues may emerge.³³⁸ The first concerns part of the applicability of IHL *ratione personae*—namely, who constitutes a party to the relevant armed conflict. The second issue concerns the scope of application of IHL *ratione materiae*—in short, whether the legal framework of IAC, of NIAC, or of a combination thereof (due to the existence of multiple, simultaneous armed conflicts) applies. And the third issue concerns establishing the responsibility of a state or an international organization for actions carried out by a non-state actor, such as a non-state organized armed group.

The precise contours of all three issues lack an agreed consensus. Debates over classification and attribution thus further complicate discerning an end-point of armed conflict.

NON-RECOGNITION OF ARMED CONFLICT

Before it can end, an armed conflict must first exist. But despite the attempt to move, since the adoption of the Geneva Conventions in 1949, toward more factually-oriented criteria to establish the existence of an armed conflict, lack of recognition that a situation amounts to an armed conflict remains a challenge in some contemporary situations.

For instance, one or more of the purported parties to an armed conflict might refuse to acknowledge the existence of the conflict. Some scholars, for instance, argue that a NIAC existed in relation to Northern Ireland as of 1972, even though the U.K. government adopted a policy of non-recognition.³³⁹ At various times, hostilities between Turkey and military components of the

331. *Id.* (footnotes omitted).

332. See, e.g., Hampson, *Afghanistan*, *supra* note 32.

333. See, e.g., Michael N. Schmitt, *Iraq (2003 onwards)*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* (Elizabeth Wilmshurst ed., 2012).

334. See, e.g., International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts* 10 (2011), 31IC/11/5.1.2; Iain Scobbie, *Lebanon 2006*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* (Elizabeth Wilmshurst ed., 2012).

335. See, e.g., Philip Leach, *South Ossetia (2008)*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* (Elizabeth Wilmshurst ed., 2012).

336. See, e.g., Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT’L L. STUD. 353 (2016).

337. See Shane R. Reeves and David Wallace, *The Combatant Status of the “Little Green Men” and Other Participants in the Ukraine Conflict*, 91 INT’L L. STUD. 361, 372–83 (2015).

338. See, e.g., Ferraro, *Foreign Intervention*, *supra* note 32.

339. See, e.g., Steven Haines, *Northern Ireland 1968–1998*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* (Elizabeth Wilmshurst ed., 2012).

Kurdistan Workers' Party (PKK) arguably met the criteria for the existence of a NIAC,³⁴⁰ yet Turkey appears to have maintained a posture of non-recognition of the purported armed conflict.

Other than perhaps concerning the doctrine of the state of war in a formal sense, it is not clear what international-legal significance the political stance of the parties vis-à-vis the existence of a conflict may have, as opposed to an objective factual determination. Still, non-recognition by a party to the conflict or a third party may have practical implications.

Consider, for instance, that a human-rights body or court might not take cognizance of the existence of a situation of armed conflict even where that conflict pertains to a matter within that body's or court's competence. Thus, despite the ICJ's approach concerning the applicability of IHL,³⁴¹ a Court might limit its judicial review of a situation of armed conflict to matters arising only from a relevant constitutive IHRL instrument, not (also) IHL.

That, for example, was the approach of the European Court of Human Rights in relation to recent eruptions of violence in Chechnya.³⁴² A formal Russian Counterterrorism Operation (KTO) was authorized by ukaz (Presidential decree) No. 1255c of September 23, 1999; the KTO was ultimately lifted on April 16, 2009 by order of the President. The ukaz authorized operations by the Unified Forces Group (made up of elements of several different Russian agencies) in the "North-Caucuses region of the Russian Federation" in accordance with the federal law "On the Suppression of Terrorism." In *Isayeva v. Russia*, the European Court of Human Rights considered "that using ... [certain bombs and other non-guided heavy combat weapons] in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society."³⁴³ Still, the Court concluded that "[t]he operation in question ... has to be judged against a *normal legal background*" because "[n]o martial law and no state of emergency ha[d] been declared in Chechnya, and no derogation ha[d] been made under Article 15 of the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms]."³⁴⁴

Outside the traditional battlespace, in some domains—not least in the realm of cyber operations—there is vanishingly little consensus on what may give rise to

340. See, e.g., Geneva Academy of International Humanitarian Law and Human Rights, *Non-international armed conflict in Turkey*, in RULE OF LAW IN ARMED CONFLICTS PROJECT (last updated: Feb. 2, 2017), <http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-turkey> <<https://perma.cc/2JZM-G2PF>>.

341. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, 242–45 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 177–81; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240.

342. On the approach of the European Court of Human Rights to IHL, see, e.g., Samuel Hartridge, *The European Court of Human Rights' [sic] Engagement with International Humanitarian Law*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (Derek Jinks, Jackson N. Maogoto, and Solon Solomon eds., 2014).

343. *Isayeva v. Russia*, App. no. 57950/00, Eur. Ct. H. R., Judgment, Feb. 24, 2005, ¶ 191.

344. *Id.* (emphasis added).

an armed conflict in the first place,³⁴⁵ let alone what should and would mark its end. We expect that this concern is likely to gain greater importance in the near future.

STATUS OF AND ADHERENCE TO AGREEMENTS BETWEEN ADVERSE PARTIES

At least two relevant challenges might arise in relation to agreements between adverse parties to an armed conflict. First, as noted above, in relation to IAC, there appears to be a lack of consensus on the legal status of armistices under international law, especially whether an armistice may denote the termination of a war.³⁴⁶ And second, as also noted above, in light of the approach that a NIAC is said to come into existence based on the *fact* of a sufficiently organized armed group (or groups) and sufficiently intense hostilities, the adoption of a peace agreement might not, of itself, definitively extinguish the existence of the NIAC and the applicability of the international-legal framework pertaining to it.³⁴⁷ One example is the August 2015 peace agreement in South Sudan, which, as of February 2017, has still not brought an end to armed conflict.³⁴⁸ Another is the Arusha Peace and Reconciliation Agreement for Burundi of August 28, 2000, which did not prevent the resumption of fighting; instead, hostilities only ended with a ceasefire agreement three years later.³⁴⁹

LONG-TERM ENMITY MARKED BY INTERMITTENT VIOLENCE

Situations of long-term enmity marked by intermittent violence might pose challenges to discerning the end of armed conflict as well. Consider two situations, both of which raise considerations under the *jus ad bellum* and IHL.

First, Israel, on one side, and Iraq (along with other Arab states), on the other, engaged in hostilities beginning in 1948. Iraq took part in hostilities against Israel in 1967, and then again in 1973; Israel bombed a nuclear reactor in Iraq in 1981; and Iraq launched missiles against Israel in 1991. A question is whether the period from 1948 to the present (or, at least, until 1991) may be characterized under international law as a *continuous* IAC between Israel and Iraq.³⁵⁰

Second, consider whether the situation concerning Iraq and the U.S. (and, at times, certain U.S. allies) from 1991 to 2004 (or a period therein) may be categorized as a *continuous* IAC. The international-legal analysis³⁵¹ turns in part on whether the

345. For a recent overview, see Johann-Christoph Woltag, *Cyber Warfare*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015).

346. See *supra* note 137.

347. See *supra* notes 321–22 and corresponding text.

348. See Lauren Ploch Blanchard, *Conflict in South Sudan and the Challenges Ahead*, CONG. RES. SERV., Sept. 22, 2016, at 5 (stating that, “[w]hile both sides publicly committed to implementing the [August 2015] peace agreement, progress stalled after it was signed. Major clashes between the two sides decreased, but armed conflict continued”).

349. See Venturini, *Temporal Scope*, *supra* note 13, at 62 n.78 (citation omitted).

350. See *supra* note 85 and corresponding text. The question implicates not only the application of IHL but also, among other things, whether, under the *jus ad bellum*, the relevant side needed a new valid basis to resort to the use of force in respect of each of the post-1948 instances outlined above.

351. For an overview, see Wolff Heintschel von Heinegg, *Invasion of Iraq (2003)*, in MAX PLANCK

relevant U.N. Security Council decisions concerning the ceasefire in Iraq pertaining to the Persian Gulf War terminated the armed conflict³⁵² or suspended hostilities without terminating the armed conflict.³⁵³

STATE RESPONSES TO TERRORISM

Various states' responses to terrorist threats also pose challenges to ascertaining the end of armed conflict. That is in no small part because some of those responses blend belligerent rights traditionally associated with war (the contemporary IHL and *ad bellum* frameworks) with sovereign rights traditionally associated with criminal law-enforcement (part of the contemporary IHRL framework). Borrowing elements from these fields of law, such a hybrid approach might result in a "quasi-permanent condition of juridical twilight, a state of neither peace nor war."³⁵⁴ As we detail in the next section with the example of the U.S.'s War on Terror, these admixtures have at times created confusion around what does and does not count as armed conflicts, who is considered a party to conflicts, how far conflicts extend geographically, and how long conflicts last (as well, therefore, of when the corresponding authorities, rights, and obligations terminate).

ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015).

352. See Christine Gray, *After the Ceasefire: Iraq, the Security Council and the Use of Force*, 65 BRIT. Y. B. INT'L L. 135 (1994).

353. See DINSTEIN, WAR, *supra* note 13, at 319–22.

354. NEFF, WAR, *supra* note 80, at 394.

7

INTERNATIONAL LAW AND THE END OF THE UNITED STATES' WAR ON TERROR

INTRODUCTION

This section explores key concepts and stakes pertaining to the end of armed conflict under international law in relation to the United States' War on Terror.³⁵⁵ The thumbnail version of the vision—as articulated, most recently, by the Obama Administration—is that the purported armed conflict will persist until a “tipping point” when terrorist organizations’ operational capacity is degraded and their supporting networks are dismantled “to such an extent that [those organizations’ forces] will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States.”³⁵⁶

Amid the numerous and diverse issues that arise in relation to the “end” of the U.S.’s War on Terror, we focus on deprivation of liberty and on targeting in direct attack. Those are two key legal stakes in whether the U.S. government continues to maintain that it is in an armed conflict with al-Qaeda and certain other terrorist organizations.³⁵⁷ Significant confusion and concern have attended

355. On the term “war on terror,” *see supra* note 5.

356. *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* 11–12, Dec. 2016, https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf <<https://perma.cc/459J-BYZ5>> [hereinafter, “*Legal and Policy Frameworks Report*”] (citing to Jeh C. Johnson, “The Conflict against Al Qa’ida and Its Affiliates: How Will It End?,” Oxford University, Nov. 30, 2012, <http://www.state.gov/documents/organization/211954.pdf> <<https://perma.cc/Z76Y-R3UJ>> [hereinafter, “Johnson, *How Will It End?*”]).

357. Chesney argues that whether the U.S. government continues to maintain that it is in an armed conflict with al-Qaeda may not result in significant *practical* change for either the use of lethal force or military detention. *See* Robert M. Chesney, *Postwar*, 5 HARV. NAT’L SEC. J. 305 (2014). Concerning the former, Chesney’s argument is rooted in the fact that “[t]he Obama Administration has made clear that lethal force would remain on the table even under a postwar model, and more specifically that it would remain an option against ‘continuous’ terrorist threats.” *Id.* Regarding military detention, according to Chesney, “[t]he situation ... is different, but only marginally so.” *Id.* at 306. While “[t]he demise of the armed-conflict model will certainly matter for the dwindling legacy population at Guantánamo (and, perhaps, for a handful of legacy detainees in Afghanistan),” he argues, “[i]t will not matter nearly so much

these issues. For instance, with respect to deprivation of liberty, following President Obama's December 2014 proclamation on the impending end of United States' "combat operations" in Afghanistan, individuals held by the U.S. at Guantánamo Bay, Cuba under justifications arising out of armed conflict in Afghanistan sought release.³⁵⁸ In a series of cases that, at times, conflated international-legal concepts concerning different types of armed conflict, U.S. courts held that release was not compelled because, despite the President's statement on the impending end of "combat operations," the relevant armed conflict had not terminated.³⁵⁹

This section aims to distill some key considerations with respect to the stakes in discerning the "end" of the purported armed conflict(s) between the U.S. and certain terrorist organizations. We first outline the concept of armed conflict against terrorist networks and the related concept of the end of that conflict that are emerging in U.S. practice. We then turn to the two focus areas.

CONCEPT OF ARMED CONFLICT AND THE END OF SUCH CONFLICT

Broadly conceived, the U.S.'s War on Terror combines traditional elements of war (such as targeting the enemy in direct attack and sanctions directed against the enemy) with conventional criminal-justice measures (such as criminal prosecution and international cooperation in intelligence matters). The U.S. does not consider that all the operations forming part of its general War on Terror are conducted in the context of an armed conflict as a matter of international law. In certain respects, the U.S.'s approach has made drawing those legal boundaries challenging. That is in part because the U.S.'s approach appears to blend, at various times and with respect to different geographic areas and seemingly different sets of enemy targets, international-legal frameworks pertaining to the use of force, to armed conflict, and to law-enforcement operations.

Relationship between International-Legal Frameworks and Domestic-Legal Frameworks

It can be difficult to untangle the pertinent legal threads, in part, because domestic authorities invoked by the government for the conduct of military operations are not always couched in the same language or with the same underlying concepts as the purported international-legal authorities that are relied on for those operations. In this context, two distinct authorizations to use military force—one against the perpetrators of the 9/11 attacks, and another against the threat posed by Iraq—currently underpin assertions of domestic authorities.³⁶⁰

for potential future detainees ... for the simple reason that the United States long ago abandoned the business of taking on new detainees outside of Afghanistan." *Id.*

358. Statement by the President on the End of the Combat Mission in Afghanistan, Dec. 28, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan> <<https://perma.cc/A7GY-N866>>.

359. See *infra* this section.

360. See Stephen W. Preston, "The Legal Framework for the United States' Use of Military Force Since 9/11," *Am. Soc. Int'l L.*, Apr. 10, 2015, <https://www.defense.gov/News/Speeches/Speech-View/Article/606662> <<https://perma.cc/4JA6-WC4T>> [hereinafter, "Preston, *Legal Framework*"] (stating

While some of the possibly-relevant U.S. practice precedes the attacks on September 11, 2001, the starting point for a legal analysis is often (though not always³⁶¹) anchored in the passage of the Authorization for Use of Military Force (2001 AUMF).³⁶² The 2001 AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”³⁶³ Under the 2001 AUMF, the U.S. commenced military operations in Afghanistan against al-Qaeda and the Taliban on October 7, 2001.³⁶⁴

In 2002, Congress passed another AUMF (the 2002 AUMF).³⁶⁵ The 2002 AUMF authorizes the use of military force against Iraq to, among other things, “defend the national security of the United States against the continuing threat posed by Iraq.” According to Stephen W. Preston, then-U.S. Department of Defense (DoD) General Counsel, “[a]lthough the threat posed by Saddam Hussein’s regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq.”³⁶⁶

that “[t]he name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF [Authorization for Use of Military Force] continuously since at least 2004. A power struggle may have broken out within bin Laden’s jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day. Viewed in this light, reliance on the AUMF for counter-ISIL operations is hardly an expansion of authority”).

361. See Laurie R. Blank and Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World*, 3 MICH. J. INT’L L. 467, 490–94 (2015).

362. For an analysis of the legacy of the Obama Administration concerning the 2001 AUMF, see Curtis A. Bradley and Jack L. Goldsmith III, *Obama’s AUMF Legacy* (Social Science Research Network Working Paper Series, 2016), <https://ssrn.com/abstract=2823701> (arguing that “[t]he transformation of the AUMF from an authorization to use force against the 9/11 perpetrators who planned an attack from Afghanistan into a protean foundation for indefinite war against an assortment of related terrorist organizations in numerous countries is one of the most remarkable legal developments in American public law in the still-young twenty-first century. ... [T]his transformation largely occurred during the Obama presidency”). *Id.* at 2.

363. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

364. Preston, *Legal Framework*, *supra* note 360 (noting that the U.S. notified the “U.N. Security Council consistent with Article 51 of the UN Charter that the United States was taking action in the exercise of its right of self-defense in response to the 9/11 attacks”).

365. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

366. Preston, *Legal Framework*, *supra* note 360 (and stating further that, “[a]fter Saddam Hussein’s regime fell in 2003, the United States, with its coalition partners, continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against AQI [Al-Qaeda in Iraq], which then, as now, posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Accordingly, the 2002 AUMF authorizes military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, in Syria”). *Id.*

Armed Conflicts

At least as of early December 2016, the Obama Administration considered the U.S. to be engaged in armed conflict as a matter of international law in:

- Afghanistan (at least against ISIS and against al-Qaeda,³⁶⁷ and, possibly, against the Taliban and certain other terrorist or insurgent groups affiliated with al-Qaeda or the Taliban in Afghanistan³⁶⁸);
- Iraq (at least against ISIS³⁶⁹);
- Libya (at least against ISIS³⁷⁰ and, possibly, against individual members of al-Qaeda³⁷¹);
- Somalia (against al-Qaeda “and its Somalia-based associated force, al-Shabaab”³⁷²);

367. See *Legal and Policy Frameworks Report*, *supra* note 356, at 15 (stating that “[a]lthough the United States has transitioned the lead for security to Afghan security forces, a limited number of U.S. forces remain in Afghanistan for the purposes of, among other things: ... conducting and supporting U.S. counterterrorism operations against the remnants of core al-Qa’ida and against ISIL; and taking appropriate measures against those who directly threaten U.S. and coalition forces in Afghanistan” and that “U.S. military operations and support for Afghan military forces in the ongoing armed conflict in Afghanistan are now undertaken consistent with the Bilateral Security Agreement between the United States and Afghanistan and with the consent of the Government of Afghanistan.” Citation omitted.

368. In a December 2016 report, the Obama administration did not expressly characterize its military actions against the Taliban and against “certain other terrorist or insurgent groups affiliated with al-Qa’ida or the Taliban in Afghanistan” as being conducted in the context of an armed conflict, but rather discussed those actions in the context of activities undertaken under the 2001 AUMF. See *Legal and Policy Frameworks Report*, *supra* note 356, at 5.

369. See *id.* at 16 (stating that, “[a]s a matter of international law, the United States is using force against ISIL in Iraq at the request and with the consent of the Government of Iraq, which has sought U.S. and coalition support in its defense of the country against ISIL. U.S. operations against ISIL in Iraq are thus conducted in the context of an armed conflict and in furtherance of Iraq and others’ armed operations against the group and in furtherance of U.S. national self-defense.” Citation omitted.

370. See *id.* at 17 (stating that, “[a]s a matter of international law, airstrikes in Libya against ISIL are being conducted at the request and with the consent of the GNA [Government of National Accord] in the context of the ongoing armed conflict against ISIL and in furtherance of U.S. national self-defense”).

371. In a December 2016 report, the Obama administration did not expressly characterize its military actions against “individuals who are part of al-Qa’ida in Libya” as being conducted in the context of an armed conflict, but rather discussed those actions in the context of activities undertaken under the 2001 AUMF. See *Legal and Policy Frameworks Report*, *supra* note 356, at 5 (stating that, “[c]onsistent with the above, the 2001 AUMF does not authorize the President to use force against every group that commits terrorist acts. Rather, the U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001 AUMF: ... individuals who are part of al-Qa’ida in Libya”). The accompanying footnote states that, “[f]or example, the United States conducted an airstrike against Mokhtar Belmokhtar, a long-time terrorist who maintained his personal allegiance to al-Qa’ida, pursuant to the authority conferred on the President by the 2001 AUMF. Under that same authority, the United States captured al-Qa’ida member Abu Anas al-Libi, accused of participating in the 1998 U.S. embassy bombings in Kenya and Tanzania.” *Id.* at 5 n.22.

372. See *id.* at 17 (and further stating that, “[a]s a matter of international law, U.S. counterterrorism operations in Somalia, including airstrikes, have been conducted with the consent of the Government of Somalia in support of Somalia’s operations in the context of the armed conflict against al-Shabaab and in furtherance of U.S. national self-defense”). *Id.*

- Syria (at least against ISIS³⁷³ and, possibly, against al-Qaeda³⁷⁴); and
- Yemen (against al-Qaeda in the Arabian Peninsula (AQAP)³⁷⁵).

In a December 2016 report, the Obama Administration did not expressly characterize U.S. military actions against “core” al-Qaeda in Pakistan as being conducted in the context of an armed conflict. Rather, the Administration discussed those actions in the context of activities undertaken under the 2001 AUMF,³⁷⁶ though that framing does not necessarily preclude an interpretation that those military actions formed part of an armed conflict.

Also, as discussed in more depth below, the Obama Administration adopted a set of policies concerning “direct action, which refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities.”³⁷⁷ As used in that context, the phrase “areas of active hostilities” is not a legal term of art.³⁷⁸ And “[t]he determination as to whether a region constitutes an ‘area of active hostilities’ does not turn exclusively on whether there is an armed conflict under international law taking place in the country at issue, but also takes into account, among other things, the size and scope

373. See *id.* at 16 (stating that, “[a]s a matter of international law, the United States is using force in Syria against ISIL and providing support to opposition groups fighting ISIL in the collective self-defense of Iraq (and other States) and in U.S. national self-defense”) read in combination with Brian J. Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign,” *Am. Soc. Int’l Law*, Apr. 1, 2016, <https://www.state.gov/s/l/releases/remarks/255493.htm> <<https://perma.cc/PV9W-KTG4>> [hereinafter, “Egan, *Counter-ISIL Campaign*”] (stating that, “[b]ecause we are engaged in an armed conflict against a non-State actor, our war against ISIL is a non-international armed conflict, or NIAC”).

374. In a December 2016 report, the Obama Administration did not expressly characterize its military actions against al-Qaeda in Syria as being conducted in the context of an armed conflict, but rather discussed those actions in the context of activities undertaken under the 2001 AUMF. See *Legal and Policy Frameworks Report*, *supra* note 356, at 17 (stating that, “the United States is using force in Syria against al-Qa’ida in Syria in self-defense of the United States and in furtherance of the security of U.S. partners and allies”); see also Preston, *Legal Framework*, *supra* note 360 (stating that, “over the past year, we have conducted military operations under the 2001 AUMF against the Nusra Front and, specifically, those members of al-Qa’ida referred to as the Khorasan Group in Syria”).

375. See *Legal and Policy Frameworks Report*, *supra* note 356, at 18 (stating that, “[a]s a matter of international law, the United States has conducted counterterrorism operations against AQAP in Yemen with the consent of the Government of Yemen in the context of the armed conflict against AQAP and in furtherance of U.S. national self-defense”).

376. See *Legal and Policy Frameworks Report*, *supra* note 356, at 5 (stating that, “[c]onsistent with the above, the 2001 AUMF does not authorize the President to use force against every group that commits terrorist acts. Rather, the U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001 AUMF: al-Qa’ida”); the accompanying footnote states that “Al-Qa’ida is used here to refer to what has at times been called ‘core al-Qa’ida,’ including the senior leaders and cadre of the organization based in Afghanistan and Pakistan who were primarily responsible for planning and carrying out the September 11th attacks in the United States. Since the degradation of those elements and the relocation of some senior leaders outside the region, the term ‘al-Qa’ida senior leaders’ is now used to refer to the overall emir and other senior figures of the group”). *Id.* at 5 n.21 (emphasis added).

377. Presidential Policy Guidance (PPG) concerning Direct Action Against Terrorist Targets Located Outside the U.S. and “Areas of Active Hostilities,” May 22, 2013, at 1 https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download <<https://perma.cc/5KL5-A2EU>> [hereinafter, “PPG”].

378. See Egan, *Counter-ISIL Campaign*, *supra* note 373.

of the terrorist threat, the scope and intensity of U.S. counterterrorism operations, and the necessity of protecting any U.S. forces in the relevant location.”³⁷⁹ At least as of December 2016, the Obama Administration considered Afghanistan, Iraq, Syria, and certain portions of Libya to constitute “areas of active hostilities” such that the PPG did not apply to “direct action” taking place in relation to those territories.³⁸⁰

General Indicia or Criteria concerning the End of Armed Conflict with Terrorist Organizations

In 2013, President Obama stated that the United States’ “systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.”³⁸¹ Yet, at least according to the Obama Administration, that end (in the event that it arrives) is probably going to be unconventional because “[g]roups like al-Qa’ida are highly unlikely to disarm and sign instruments of surrender. And given their radical objectives, groups like al-Qa’ida are also highly unlikely ever to denounce terrorism and violence and to seek to address their perceived grievances through some form of reconciliation or participation in a political process.”³⁸²

How, according at least to the Obama Administration, will the purported armed conflict with non-state terrorist organizations end? The basic theory is that, “[a]t a certain point, the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa’ida to such an extent that they will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States.”³⁸³ At that “tipping point,”³⁸⁴ “there will no longer be an ongoing armed conflict between the United States and those forces.”³⁸⁵ That day had not yet come, in the view of the Obama Administration as of early December 2016, because al-Qaeda and ISIL “still pose a real and profound threat to U.S. national security. As a result, the United States remains in a state of armed conflict against these groups as a matter of international law....”³⁸⁶ Thus, the foundational concern is the *capacity* of a terrorist organization to launch a strategic attack against the U.S. coupled with the *will* to do so.³⁸⁷

379. *Legal and Policy Frameworks Report*, *supra* note 356, at 25.

380. *Id.*

381. *Remarks by the President at the National Defense University*, May 23, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-barack-obama> <<https://perma.cc/2C7U-X72Z>>.

382. *Legal and Policy Frameworks Report*, *supra* note 356, at 11.

383. *Id.* at 11–12; *see also* Preston, *Legal Framework*, *supra* note 360.

384. *See* Johnson, *How Will It End?*, *supra* note 356.

385. *Legal and Policy Frameworks Report*, *supra* note 356, at 12 (citing to Johnson, *How Will It End?*); *see also* Preston, *Legal Framework*, *supra* note 360.

386. *Legal and Policy Frameworks Report*, *supra* note 356, at 12.

387. This theory is arguably similar to the view espoused by President George W. Bush in an address to Congress nine days after the attacks of September 11, 2001: “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” Address to a Joint Session of Congress and the American People, Sept. 20, 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> <<https://perma.cc/Z3K2-G4NL>>.

TWO KEY STAKES

Deprivation of Liberty³⁸⁸

The following series of cases sketches how U.S. courts have attempted to address the legality of the initial capture, ongoing deprivation of liberty, and possible release of individuals detained in relation to the War on Terror. In key respects, judicial imprecision in the interpretation and application of IHL has frustrated attempts to coherently determine as a matter of international law the existence—and, possibly, the termination—of a relevant armed conflict. In particular, in addressing capture, deprivation of liberty, and disposition in relation to the War on Terror, U.S. courts have largely failed to consistently and coherently ascertain the scope of application of IHL. That threshold-classification failure may matter in no small part because, as shown in Sections 4 and 5, international law lays down—in relation to various types of armed conflict—different provisions concerning modalities governing initial and ongoing deprivation of liberty, timing of release, and ultimate disposition.

Hamdi

Hamdi v. Rumsfeld (2004) is a Supreme Court case that concerned the President's authority to detain "enemy combatants" as part of the conflict authorized by the 2001 AUMF. More specifically, *Hamdi* addressed the question of whether, in the circumstances, a detained American citizen, Yasser Hamdi, could seek independent review of the legality of his detention. Of the four separate opinions written, none received the support of a majority of justices. Nonetheless, as Jennifer Elsea and Michael Garcia summarize, "a majority of the Court recognized that, as a necessary incident to the 2001 AUMF, the President is authorized to detain persons captured while fighting U.S. forces in Afghanistan (including U.S. citizens), and potentially hold such persons for the duration of the conflict to prevent their return to hostilities."³⁸⁹ For the purposes of the case, the government had made clear that "the enemy combatant that it is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there."³⁹⁰

In a plurality opinion, Justice O'Connor held, among other things, that:

There can be no doubt that individuals who *fought against the United States in Afghanistan as part of the Taliban*, an organization known to have supported the al Qaeda terrorist network responsible for [the 9/11] attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, *for the duration of the particular conflict in which they were captured*, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.³⁹¹

388. See generally Weizmann, *The End of Armed Conflict*, *supra* note 13.

389. Jennifer K. Elsea and Michael John Garcia, *Judicial Activity concerning Enemy Combatant Detainees: Major Court Rulings*, CONG. RES. SERV., Sept. 9, 2014, at 2 (citations omitted).

390. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (citing to Brief for Respondents 3; internal quotation marks removed).

391. *Id.* at 518 (emphasis added).

A premise underlying this holding is that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war...”³⁹² The plurality understood “Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the *relevant* conflict.”³⁹³ And that understanding, according to the plurality, “is based on longstanding law-of-war principles.”³⁹⁴

Justice O’Connor did caution that, “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.”³⁹⁵ Still, she reasoned, “[a]ctive combat operations *against Taliban fighters* apparently are ongoing in Afghanistan. The United States may detain, *for the duration of these hostilities*, individuals *legitimately determined to be Taliban combatants* who ‘engaged in an armed conflict against the United States.’”³⁹⁶

In holding that “[i]t is a clearly established principle of the law of war that detention may last *no longer than active hostilities*,” Justice O’Connor cited provisions that are applicable as a matter at least of treaty law only to international armed conflicts—not to non-international armed conflicts.³⁹⁷ Yet she did not expressly classify the relevant conflict in *Hamdi* as an IAC.³⁹⁸

Hamdan

In *Hamdan v. Rumsfeld* (2006), a 6–3 majority of the Supreme Court held that the military commissions established pursuant to a presidential order to try suspected terrorists of law-of-war violations did not comply with the Uniform Code of Military Justice (UCMJ) or with the law of war (as embodied in the 1949 Geneva Conventions and as incorporated into the UCMJ).³⁹⁹

This case turned, in part, on the classification—whether as an IAC or a NIAC—of the purported armed conflict in which Salim Ahmed Hamdan, Osama bin Laden’s former chauffeur, had allegedly participated. That classification would help determine whether Hamdan could invoke the Geneva Conventions at all, and, if so,

392. *Id.* at 519.

393. *Id.* at 521 (emphasis added).

394. *Id.*

395. *Id.*

396. *Id.* (emphasis added; internal citations omitted).

397. *Id.* at 520–21 (emphasis added; citations omitted).

398. In their respective submissions to the Supreme Court, neither Hamdi nor the government expressly characterized the armed conflict, as a matter of international law, as international or non-international in character. *But see* Brief for the Respondents in Opposition, Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi, Petitioners, v. Donald Rumsfeld, Secretary of Defense, *et al.*, 2003 WL 23189498 (U.S.), at 37 (stating that “Hamdi is by no means an ordinary American: he went to Afghanistan to train with and if necessary fight for the Taliban; he stayed there after American forces entered the country en masse; and he surrendered on the battlefield in Afghanistan with an enemy unit, armed with an AK-47 military-assault rifle. This Court long ago recognized that such a battlefield combatant, even if he can establish his American citizenship by birth or other means, is subject to capture and detention by the military during the conflict. That principle has peacefully co-existed with the constitutional rights of truly ordinary Americans for more than half a century, during which the Nation’s armed forces have been engaged in numerous *international conflicts*”) (emphasis added; internal citation omitted).

399. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

which of provisions of them.

Earlier in the proceedings, “the Court of Appeals concluded that the [Geneva] Conventions did not in any event apply to the armed conflict during which Hamdan was captured.”⁴⁰⁰ Rather, the Court of Appeals “accepted the Executive’s assertions that Hamdan was captured in connection with the *United States’ war with al Qaeda* and *that that war is distinct from the war with the Taliban in Afghanistan*.”⁴⁰¹ The Court of Appeals “further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions.”⁴⁰² In its 6–3 opinion, a majority of the Supreme Court expressly disagreed with the latter conclusion.⁴⁰³

The government had argued that “[t]he conflict with al Qaeda is not ... a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions ... renders the full protections applicable only to ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.’”⁴⁰⁴ Rather, according to the Government, “[s]ince Hamdan was captured and detained incident to *the conflict with al Qaeda and not the conflict with the Taliban*, and since al Qaeda, unlike Afghanistan, is not a ‘High Contracting Party’ ..., the protections of those Conventions are not ... applicable to Hamdan.”⁴⁰⁵ A majority of the Supreme Court expressly held that they “*need not decide the merits of this argument* because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.”⁴⁰⁶ That provision was held to be Common Article 3.⁴⁰⁷ The majority noted that certain provisions of Common Article 3 protect “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by ... detention.”⁴⁰⁸ In particular, “[o]ne such provision prohibits ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”⁴⁰⁹

In that part of the judgment, the Supreme Court majority rejected the Government’s claim—which the Court of Appeals had accepted—that Common Article 3 does not apply to Hamdan “because the conflict with al Qaeda, being international in scope, does not qualify as a conflict not of an international character.”⁴¹⁰ That Government reasoning, according to the majority, “is erroneous. The term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations. So much is demonstrated by the ‘fundamental logic

400. *Id.* at 628.

401. *Id.* (emphasis added).

402. *Id.*

403. *Id.*

404. *Id.* at 628–29 (citations omitted).

405. *Id.* at 629 (emphasis added; citations omitted).

406. *Id.* (emphasis added).

407. *Id.* at 629–31.

408. *Id.* at 629–30 (citation omitted).

409. *Id.* at 630 (citation omitted).

410. *Id.* (internal quotation marks and citation omitted).

[of] the Convention's provisions on its application."⁴¹¹ The majority went on to distinguish situations to which Common Article 2 (concerning IACs) applied from situations to which Common Article 3 (concerning NIACs) applied. "The latter kind of conflict," the majority reasoned, "is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase 'not of an international character' bears its literal meaning."⁴¹² In support of its conclusion, the majority recited a portion of an ICRC *Commentary* on Common Article 3, which the majority characterized as making "clear that the scope of application of the Article must be as wide as possible."⁴¹³

With respect to the classification of the relevant armed conflict(s) as a matter of international law, the full import of the *Hamdan* majority's analysis and holdings is difficult to pin down. On one hand, the majority clearly distinguishes between "international" and "non-international" armed conflicts. On the other hand, the majority expressly avoided deciding the merits of the argument that, "[s]ince Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a 'High Contracting Party' ..., the protections of those Conventions are not ... applicable to Hamdan."⁴¹⁴ Moreover, as part of its reasoning, the majority cited to authorities establishing that Common Article 3 protections are a minimum level of protection not only in relation to "non-international" armed conflicts but also in relation to "international" armed conflicts.⁴¹⁵ And the majority expressly reserved the question of whether Hamdan's "potential status as a prisoner of war independently renders illegal his trial by military commission."⁴¹⁶ (Recall that, at least as a matter of treaty law, IHL provisions concerning prisoner-of-war status are laid down only in relation to IACs.) In these respects, the majority opinion in *Hamdan* leaves open several important questions. The Supreme Court has not directly resolved those questions in subsequent decisions. Rather, attempts to answer those questions have fallen to lower courts.

In subsequent litigation, successive administrations and multiple lower courts

411. *Id.* (citations omitted).

412. *Id.* at 630–31 (citations omitted).

413. *Id.* at 631 (citations omitted). In 2016, the ICRC articulated a slightly different approach:

While common Article 3 contains rules that serve to limit or prohibit harm in non-international armed conflict, it does not in itself provide rules governing the conduct of hostilities. However, when common Article 3 is applicable, it is understood that other rules of humanitarian law of non-international armed conflict, including those regarding the conduct of hostilities, also apply. Thus, while there may be no apparent need to discern possible limits to the scope of application of common Article 3, it is important that the rules applicable in armed conflicts apply only in the situations for which they were created. [¶] *The existence of a situation that has crossed the threshold of an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' must therefore be neither lightly asserted nor denied.* Humanitarian law standards must be applied only in the situation – armed conflict – for which they were intended and developed, carefully balancing considerations of military necessity and humanity.

GC I 2016 COMMENTARY, *supra* note 68, at ¶¶ 398–390 (emphasis added; citation omitted).

414. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (citation omitted).

415. *Id.* at 631.

416. *Id.* at 630.

have often interpreted and applied the majority's *Hamdan* reasoning in ways that have confused whether—as a matter of international law—there are multiple, distinct purported armed conflicts (against the Taliban and against al-Qaeda, for instance) or a single purported armed conflict (against the Taliban, al-Qaeda, and “associated forces”). Though relatively few U.S. courts have extensively drawn on international-legal sources and methodologies to ascertain which IHL provisions and rules may be relevant, that confusion—as to whether there is one purported armed conflict or multiple purported armed conflicts—is at the root of much of the ensuing inconsistent and non-comprehensive reasoning regarding the application of IHL to any particular person deprived of liberty in relation to the War on Terror. That reasoning bears, in turn, on the question of how long such a detainee may be held for.

Al-Bihani

Al-Bihani v. Obama (2010) concerned a Yemeni citizen named Ghaleb Nassar Al-Bihani, who—in appealing the denial of his petition for a writ of habeas corpus—claimed that his detention at Guantánamo was not authorized by statute and that the procedures of his habeas proceeding were constitutionally infirm. On January 5, 2010, a three-judge panel on the Court of Appeals of the D.C. Circuit, in an opinion written by Judge Brown, denied Al-Bihani's appeal.⁴¹⁷

At the outset, as a matter of domestic law, the Court rejected “the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war.”⁴¹⁸ Instead, according to the Court, “[w]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers.”⁴¹⁹ To resolve al-Bihani's case, the Court looked to the text of the relevant statutes and controlling domestic law—it had, in its view, “no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles.”⁴²⁰

Having formulated its approach to relevant sources of law, the Court established the government's detention authority under domestic law.⁴²¹ In a nutshell, the Court interpreted the facts as showing that Al-Bihani was both part of and substantially supported enemy forces and was therefore detainable under applicable U.S. law.⁴²² Those facts included, as acknowledged by Al-Bihani, that he accompanied the 55th Arab Brigade (in the Court's words, “a paramilitary group allied with the Taliban, ... which included Al Qaeda members within its command structure and which fought on the front lines against the Northern Alliance”⁴²³) on the battlefield in Afghanistan, carried a brigade-issued weapon, cooked for the unit, and retreated

417. *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010).

418. *Id.* at 871.

419. *Id.* (citation omitted).

420. *Id.* at 871–72.

421. *Id.* at 872–74.

422. *Id.* at 873–74.

423. *Id.* at 869.

and surrendered under brigade orders.⁴²⁴

The Court then turned to Al-Bihani's argument, rooted in *Hamdi*, that he must be released according to "longstanding law-of-war principles"⁴²⁵ "because *the conflict with the Taliban* has allegedly ended."⁴²⁶ The Court noted that "Al-Bihani offers the court a choice of numerous event dates—the day Afghans established a post-Taliban interim authority, the day the United States recognized that authority, the day Hamid Karzai was elected President—to mark the official end of the conflict."⁴²⁷ According to the Court, "[n]o matter which [of those dates] is chosen, each would dictate the release of Al-Bihani if" the Court followed his reasoning.⁴²⁸ But, the Court ultimately concluded, Al-Bihani's argument failed on factual and practical grounds.⁴²⁹

First, the Court stated, "it is not clear if Al-Bihani was captured in *the conflict with the Taliban or with Al Qaeda*; he does not argue that *the conflict with Al Qaeda is over*."⁴³⁰ Second, the Court noted, "there are currently 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan, with tens of thousands more to be added soon."⁴³¹ According to the Court, "[t]he principle Al-Bihani espouses—were it accurate—would make each successful campaign of a long war but a Pyrrhic prelude to defeat."⁴³² That would be because "[t]he initial success of the United States and its Coalition partners in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release *Taliban fighters* captured in earlier clashes."⁴³³ Accordingly, the Court held, "the victors would be commanded to constantly refresh the ranks of the fledgling democracy's most likely saboteurs."⁴³⁴

In his response to that (in the words of the Court) "commonsense observation," "Al-Bihani contends the current hostilities are a *different conflict, one against the Taliban reconstituted in a non-governmental form*, and the government must prove that Al-Bihani would join this insurgency in order to continue to hold him."⁴³⁵ Yet, in the eyes of the Court, "even the laws of war upon which he relies do not draw such fine distinctions."⁴³⁶ To sustain this reasoning, the Court stated that "[t]he Geneva Conventions require release and repatriation only at the 'cessation of active hostilities.'"⁴³⁷ In this connection, the Court found it "significant" "[t]hat the [Geneva] Conventions use the term 'active hostilities' instead of the terms 'conflict' or 'state of war' found elsewhere in the

424. *Id.* at 872–73.

425. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004); *see supra* this section.

426. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) (emphasis added).

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* (emphasis added).

431. *Id.* (citations omitted).

432. *Id.*

433. *Id.* (emphasis added).

434. *Id.* (emphasis added).

435. *Id.* (emphasis added).

436. *Id.*

437. *Id.* (citing to Article 118 GC III).

document.”⁴³⁸ According to the Court, the use of the term “active hostilities” in Article 118(1) of GC III “serves to distinguish the physical violence of war from the official beginning and end of a conflict, because fighting does not necessarily track formal timelines.”⁴³⁹ Therefore, in the eyes of the Court, “[t]he [relevant Geneva] Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops.”⁴⁴⁰

Ultimately, the Court did not rest its resolution of the issue of when release is required on such common sense or on international law.⁴⁴¹ Rather, in the Court’s view, “[t]he determination of when hostilities have ceased is a political decision,” and the Court therefore deferred “to the Executive’s opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war.”⁴⁴² In short, the Court reasoned, “[i]n the absence of a determination by the political branches that hostilities in Afghanistan have ceased, Al-Bihani’s continued detention is justified.”⁴⁴³

The above-highlighted elements of the Court’s reasoning in *Al-Bihani* might be significant here for four reasons. First, Article 118(1) of GC III underpins an important part of the reasoning. As a matter of international law, that provision is applicable only in relation to IACs. The Court, however, does not expressly classify the relevant armed conflict as international in character. It is not clear why the Court points to Article 118(1) of GC III—the Court never, for example, states that the provision is applicable as a matter of international law (which would imply that Al-Bihani qualifies as a prisoner of war under GC III), nor does it state that the provision provides a useful (if non-applicable) analogy.

Second, the Court noted that, in principle, there may be two separate conflicts—one with the Taliban, and another with al-Qaeda.⁴⁴⁴ Yet, with respect to the issues raised by Al-Bihani, including the legal parameters concerning release, the Court seemed to draw no relevant international-legal distinctions between those conflicts. Nor did the Court expressly classify either of those purported conflicts—whether as being international or non-international in character—as a matter of international law.

Third, the Court might be seen as misapprehending the “laws of war” upon which purportedly Al-Bihani depended, at least to the extent that IHL *does* make certain “fine distinctions”—some of which might be relevant to release—between IACs and NIACs.⁴⁴⁵ That said, it is not clear from the Court’s decision whether

438. *Id.*

439. *Id.* (citing to Articles 2 and 118 GC III).

440. *Id.*

441. *Id.*

442. *Id.* (citations omitted).

443. *Id.* at 875.

444. *Id.* at 874 (stating that, “it is not clear if Al-Bihani was captured in the conflict with the Taliban *or* with Al Qaeda”). Emphasis added.

445. Assuming that at least one of the “fine distinctions” the Court was referring to concerned the alleged (by Al-Bihani) change in conflict classification (from IAC to NIAC). The text of the opinion is unclear, however, as to whether the referenced “fine distinctions” might concern only whether “the government must prove that Al-Bihani would join this insurgency in order to continue to hold him.” *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010).

Al-Bihani argued that the relevant conflict transformed from an IAC into a NIAC *as a matter of international law*, though Al-Bihani did apparently argue that he was captured in an international conflict between the U.S. and the Government of Afghanistan.⁴⁴⁶ For its part, the government had argued that the relevant conflict was “the conflict against the joint forces of al-Qaida, the Taliban, and associated forces, and hostilities in that conflict continue,”⁴⁴⁷ but that, “[r]egardless of whether the nature of the conflict changed, the time at which hostilities are at an end is a matter for the political branches and not the courts.”⁴⁴⁸

Fourth, the *Al-Bihani* Court interprets the “cessation of active hostilities” phrase laid down in Article 118(1) of GC III as being triggered at the point where “the fighting stops.”⁴⁴⁹ The Court does not expressly discuss whether that “fighting” includes hostilities involving only the Taliban or also al-Qaeda.

Al Warafi

On July 30, 2015, Judge Lamberth of the D.C. District Court rejected the challenge to the legality of Mikhtar Yahia Naji al Warafi’s detention at Guantánamo.⁴⁵⁰ Al Warafi had argued that recent statements by President Obama proved that the hostilities that justified his detention—hostilities between the U.S. and the Taliban in Afghanistan—had ended.⁴⁵¹ The government argued that Al Warafi’s detention is authorized under the 2001 AUMF because the U.S. remains engaged in active hostilities with the Taliban in Afghanistan.⁴⁵²

As part of his reasoning, Judge Lamberth recited the holding in *Al-Bihani* that “release is only required when the fighting stops.”⁴⁵³ Judge Lamberth held that the government had “offered convincing evidence that U.S. involvement in the fighting

446. Brief for Appellees, Ghaleb Nassar Al Bihani, Petitioner-Appellant, v. Barack H. Obama, *et al.*, Respondents-Appellees, 2009 WL 2957826 (C.A.D.C.) (characterizing Al Bihani as arguing that, “even if he was properly detained as part of the enemy forces, he must be repatriated because the ‘relevant conflict’ in which he was captured ended long ago – perhaps ‘as early as December 2001,’ but in any event no later than May 2005, when the United States recognized the Karzai government in Afghanistan. According to al-Bihani, he was captured as part of an international conflict between two sovereign governments: the United States and the Government of Afghanistan (then controlled by the Taliban). Once the United States recognized the new Afghan Government, he claims, the international conflict ended. The ongoing hostilities, al-Bihani explains, are a *new war* – one involving not the Government of Afghanistan but a ‘neo-Taliban successor insurgency’”) (citations omitted).

Assuming for the sake of argument that the relevant conflict did so transform, such a change in character, as Sassòli explains, may matter significantly from an international-legal perspective because “[t]his [change] could trigger the obligation to repatriate POWs, as only a minority opinion argues that in a NIAC the members of adverse armed forces or groups may be detained until the end of active hostilities without further procedures.” Sassòli, *Prisoners of War*, *supra* note 13, at 1048 (internal cross-reference omitted).

447. Brief for Appellees, Ghaleb Nassar Al Bihani, Petitioner-Appellant, v. Barack H. Obama, *et al.*, Respondents-Appellees, 2009 WL 2957826 (C.A.D.C.).

448. *Id.* (internal citations omitted).

449. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010).

450. *Al Warafi v. Obama*, No. CV 09-2368 (RCL), 2015 WL 4600420, at 1 (D.D.C. July 30, 2015).

451. *Id.*

452. *Id.*

453. *Id.* at 5 (citation omitted).

in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped.”⁴⁵⁴

In one of his responses, Al Warafi had argued “that any engagements between U.S. forces and the Taliban ‘would at most be collateral effects of pursuing al Qaeda or assisting the Afghan security forces, and do not represent a war by the United States against the Taliban.’”⁴⁵⁵ But, according to Judge Lambert, “war is not required here; all the [2001] AUMF detention authority demands is that the fighting continue. The government has shown that the fighting in fact continues, and [Al Warafi] does not dispute this.”⁴⁵⁶

Al Warafi had asserted “that one rationale for wartime detention (the fear of replenishing the enemy’s ranks) would not be implicated by his release” for two reasons. First, because Al Warafi “is not an Afghan and has no current connection with the Taliban or Afghanistan,” and second, because the U.S. government “could simply not release him to Afghanistan.”⁴⁵⁷ Regarding the first point, Judge Lamberth ruled that “that did not stop [Al Warafi] from assisting the Taliban in the first place.”⁴⁵⁸ And, as to the second point, according to Judge Lamberth, “Al Warafi does not say how [the Executive] could, having released him to somewhere besides Afghanistan, stop him from returning there.”⁴⁵⁹

Judge Lamberth’s decision in *Al Warafi* is relevant to our analysis here for two reasons. First, following the reasoning of some earlier courts, Judge Lamberth held that the *factual existence of fighting*—and not merely the statements of political authorities—matters in discerning whether the 2001 AUMF continues to provide a basis to detain Al Warafi. And second, Judge Lamberth does not link Al Warafi’s detention to a particular IAC or NIAC. Rather, Judge Lamberth emphasized the fact that the government had “offered convincing evidence that U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped.”⁴⁶⁰ Yet, as detailed in Sections 4 and 5, there are, in many respects, significant differences—including in terms of number and specificity—between, on one hand, IHL treaty provisions pertaining to IAC and, on the other, IHL treaty provisions pertaining to NIAC as to grounds for detention and disposition of those deprived of liberty in connection with an armed conflict.

Hamdullah

On March 29, 2016, Judge Kessler of the D.C. Circuit denied the motion of an Afghan citizen named Haji Hamdullah for a writ of habeas corpus seeking release from detention in Guantánamo. Hamdullah had raised two issues: whether “active hostilities” in Afghanistan are considered to have ended, and who makes that determination.⁴⁶¹ Judge Kessler ruled that “active hostilities” in Afghanistan had not ceased, thus warranting the continued detention of Hamdullah.⁴⁶²

454. *Id.* at 7.

455. *Id.* (citation omitted).

456. *Id.*

457. *Id.* (citation omitted).

458. *Id.*

459. *Id.*

460. *Id.* (emphasis added).

461. *Razak v. Obama*, 174 F. Supp. 3d 300, 304 (D.D.C. 2016).

462. *Id.* at 302.

Judge Kessler located “[t]he crux of the Parties’ disagreement” as “whether detention is authorized for the duration of ‘active combat’ or ‘active hostilities.’”⁴⁶³ She briefly outlined the history leading up to “the cessation of active hostilities” phrase laid down in Article 118(1) of GC III. Citing to the ICRC’s *Commentary on GC III*, Judge Kessler recalled that “the ‘cessation of active hostilities’ standard was first adopted in the 1949 Geneva Conventions following the delayed repatriation of prisoners of war in earlier armed conflicts.”⁴⁶⁴ Judge Kessler noted that “[t]he two predecessor multilateral law-of-war treaties to the 1949 Geneva Conventions required repatriation of prisoners of war only ‘after the conclusion of peace.’”⁴⁶⁵ “Repatriation delays arose after World Wars I and II,” she noted, “due to a substantial gap in time between the cessation of active hostilities and the signing of formal peace treaties.”⁴⁶⁶ In this historical context, Judge Kessler reasoned, “[t]he ‘cessation of active hostilities’ requirement sought to correct this problem, thereby making repatriation no longer contingent on a formal peace accord or political agreement between the combatants.”⁴⁶⁷

Against that backdrop, Judge Kessler held that Hamdullah “correctly interprets [GC III’s] ‘cessation of active hostilities’ so that final peace treaties are no longer a prerequisite to mandatory release of prisoners of war.”⁴⁶⁸ That change is the basis Hamdullah’s argument, in the words of Judge Kessler, that GC III “contemplates the possibility that some degree of conflict might continue even after the core of the fighting has subsided.”⁴⁶⁹ Accordingly, Hamdullah “argues that cessation of active hostilities requires only an end to active combat,”⁴⁷⁰ and he “reaches this conclusion by comparing the language of [GC III] with language in Articles 6 and 133 of [GC IV].”⁴⁷¹ Judge Kessler noted that “Article 133 of [GC IV] addresses the internment of civilians in wartime and provides that such internment ‘shall cease as soon as possible after the close of hostilities.’”⁴⁷² In an attempt “to show that ‘close of hostilities’ could be a point in time that might occur after ‘cessation of active hostilities,’” Hamdullah relied on the ICRC’s *Commentary on GC IV*.⁴⁷³ But Judge Kessler was not convinced by that argument. Rather, she pointed out that the ICRC’s *Commentary on GC IV* that Hamdullah “cites acknowledges that the provisions are similar and ‘should be understood in the same sense.’”⁴⁷⁴

Judge Kessler next addressed Hamdullah’s view of Article 6(2) of GC IV. (Recall that that provision provides that the application of GC IV “shall cease upon the close of military operations.”) Again citing the ICRC’s *Commentary on GC IV*, Judge Kessler held that “[t]he phrase ‘close of military operations’ [in Article

463. *Id.* at 305 (citations omitted).

464. *Id.* (citation omitted).

465. *Id.* (citation omitted).

466. *Id.* at 305–06 (citation omitted).

467. *Id.* at 306 (citations omitted).

468. *Id.*

469. *Id.* (citation omitted).

470. *Id.* (citation omitted).

471. *Id.* (citations omitted).

472. *Id.* (citation omitted).

473. *Id.*

474. *Id.* (citation omitted).

6(2) of GC IV] was understood to mean ‘the final end of all fighting between all those concerned.’”⁴⁷⁵ The Court agreed with Hamdullah “that ‘cessation of active hostilities’ is distinct from ‘close of military operations,’ and that *active hostilities can cease prior to the close of military operations*.”⁴⁷⁶ Judge Kessler reasoned that “[t]his distinction is consistent with the differing purposes of Article 6 [of GC IV] (defining the period of time in which [GC IV], in its entirety, applies) and Article 118 [of GC III] (focusing on detention specifically).”⁴⁷⁷ Yet, she emphasized, “it does not necessarily follow that ‘cessation of active hostilities’ therefore requires only an end to *combat operations*,” as Hamdullah argues.⁴⁷⁸

In sum, Judge Kessler concluded “that the appropriate standard is cessation of active hostilities and that active hostilities can continue after combat operations have ceased. But, cessation of active hostilities is not so demanding a standard that it requires total peace, signed peace agreements, or an end to all fighting.”⁴⁷⁹

Judge Kessler’s analysis, in rejecting Hamdullah’s appeal, is relevant for our purposes for two reasons. The first concerns whether Hamdullah qualifies as a prisoner of war under GC III (and domestic implementing legislation). Judge Kessler never explicitly made that holding. Nonetheless, it might be notable that she did characterize Hamdullah as being “detained as a prisoner of war;”⁴⁸⁰ she assessed GC III as part of the legal analysis;⁴⁸¹ and she concluded that the appropriate standard is “the cessation of active hostilities” (which she derived through analysis of Article 118 of GC III in comparison to Articles 6(2) and 133 of GC IV).⁴⁸²

Second, upon holding that “the cessation of active hostilities” standard—which is laid down in Article 118(1) of GC III—is the relevant release-and-repatriation temporal formulation concerning Hamdullah, Judge Kessler held that active hostilities can continue after combat operations are over and that “the cessation of active hostilities” does not require total peace, signed peace agreements, or an end to all fighting.⁴⁸³ In respect of at least that last clause, Judge Kessler did not expressly adopt the portion of *Al-Bihani* that stated that “release [in the sense of Article 118 of GC III] is only required when the fighting stops.”⁴⁸⁴

Targeting in Direct Attack

The second major stake concerns the international-legal parameters of targeting in direct attack. We first review key portions of a U.S. government legal memorandum that analyzes, among other things, elements of the scope of armed conflict against AQAP. We then outline portions of a presidential policy guidance

475. *Id.* (citation omitted).

476. *Id.* (emphasis added).

477. *Id.* (citation omitted).

478. *Id.* (emphasis added).

479. *Id.*

480. *Id.* at 301 (stating that “[p]etitioner Haji Hamdullah has been detained as a prisoner of war by the United States since his capture in 2003”) (citation omitted).

481. *Id.* at 304.

482. *Id.* at 306.

483. *Id.*

484. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010).

pertaining to “direct action” against terrorist targets located outside the United States and “areas of active hostilities.”⁴⁸⁵

Al-Aulaki Memorandum

A memorandum, dated July 16, 2010, addressing the “Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaki” (the memorandum) was prepared on the letterhead of the Office of the Legal Counsel (OLC) and was signed by David J. Barron. At the time, Barron was Acting Assistant Attorney General; later, he was appointed to the U.S. Court of Appeals for the First Circuit. Part of the memorandum—a redacted version of which was made available through litigation—reviewed whether a proposed lethal operation in Yemen against a U.S. citizen “would comply with the international law rules to which it would be subject....”⁴⁸⁶ “Based on the combination of facts presented,” the OLC concluded that the “DoD would carry out-its [*sic*] operation as part of the [NIAC] between the United States and al-Qaida, and thus that on those facts the operation would comply with international law so long as DoD would conduct it in accord with the applicable laws of war that govern targeting in such a conflict.”⁴⁸⁷

Part of the analysis underpinning that conclusion rested on the view that:

In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida. In so holding, the Court ... held ... that a conflict between a transnational non-state actor and a nation, occurring outside that nation’s territory, is an armed conflict ‘not of an international character’ because it is not a ‘clash between nations.’⁴⁸⁸

The fact that the contemplated DoD operation would occur in Yemen, “a location that is far from the most active theater of combat between the United States and al-Qaida,” did not affect the OLC’s conclusion pursuant to the view that “the combination of facts present here would make the DoD operation in Yemen part of the [NIAC] with al-Qaida.”⁴⁸⁹

The OLC addressed some commentators’ view “that the conflict between the [US] and al-Qaida cannot extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself.”⁴⁹⁰ The OLC found “little judicial or other authoritative, [*sic*] precedent that speaks directly to the question of the geographic scope of a [NIAC] in which one of the parties is a

485. For a recent analysis of international-legal elements of the approach of the United Kingdom to targeted killing outside armed conflict, see Christine Gray, *Targeted killing outside armed conflict: a new departure for the UK?*, 3 J. USE OF FORCE INT’L L. 198 (2016).

486. OLC–DOD Memorandum after appropriate redactions and deletion of classification codes, July 16, 2010, as reproduced as Appendix A in *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 124 (2d Cir.), opinion amended on denial of reh’g, 758 F.3d 436 (2d Cir. 2014), supplemented, 762 F.3d 233 (2d Cir. 2014) [hereinafter, “*Al-Aulaki Memorandum*”].

487. *Id.* at 137.

488. *Id.* (citations omitted).

489. *Id.* (citations omitted).

490. This view, according to the memorandum, is grounded in the *Tadić* formula “that for purposes of international law an armed conflict generally exists only when there is ‘protracted armed violence between governmental authorities and armed groups.’” *Id.* at 138 (citation omitted).

transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict.”⁴⁹¹ The OLC therefore looked “to principles and statements from analogous contexts, recognizing that they were articulated without consideration of the particular factual circumstances of the sort of conflict at issue here.”⁴⁹² In doing so, the OLC did

not come across any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. That does not appear to be the rule, or the historical practice, for instance, in a traditional international conflict.⁴⁹³

Nor did the OLC “see any obvious reason why that more categorical, nation-specific rule should govern in analogous circumstances in this sort of [NIAC].”⁴⁹⁴ Instead, the OLC thought that “the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case,” emphasizing that “[s]uch an inquiry may be particularly appropriate in a conflict of the sort here, given that the parties to it include transnational non-state organizations that are dispersed and that thus may have no single site serving as their base of operations.”⁴⁹⁵

The OLC found “some support for this view in an argument the [U.S.] made to the [ICTY] in 1995.”⁴⁹⁶ That is because “in that case the [U.S.] argued that in determining *which* body of humanitarian law applies in a particular conflict, ‘the conflict must be considered as a whole,’ and that ‘it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically, in an attempt to exclude the application of [the relevant] rules.’”⁴⁹⁷ The OLC conceded that “the basic approach that the [U.S.] proposed in *Tadić*, and that the ICTY may be understood to have endorsed, was advanced without the current conflict between the U.S. and al-Qaida in view.”⁴⁹⁸ Nonetheless, the OLC argued, “that approach reflected a concern with ensuring that the laws of war, and the limitations on the use of force they establish, should be given an appropriate application.”⁴⁹⁹ And, the

491. *Id.*

492. *Id.*

493. *Id.* at 138–39 (citations omitted).

494. *Id.* at 139 (citation omitted).

495. *Id.* (citation omitted).

496. *Id.* The U.S. Government submitted an amicus-curiae brief in the case to “offer the views of the United States on certain issues raised in the motions filed by Counsel for the Accused on 23 June 1995, particularly with respect to the validity of the action of the Security Council in creating the Tribunal and the interpretation of the jurisdictional provisions of the Statute.” See Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the case of The Prosecutor of the Tribunal v. Dusan Tadic, United States, regarding the validity of the ICTY (July 17, 1995), <https://www.state.gov/documents/organization/65825.pdf> <<https://perma.cc/UJR7-MZPU>>.

497. *Id.* (emphasis original; citations omitted).

498. *Id.* at 140 (citation omitted).

499. *Id.* (citations omitted).

OLC contended, “that same consideration, reflected in *Hamdan* itself ... suggests a further reason for skepticism about an approach that would categorically deny that an operation is part of an armed conflict absent a specified level and intensity of hostilities in the particular location where it occurs.”⁵⁰⁰

Against this backdrop, the OLC reasoned that, “in applying the more context-specific approach to determining whether an operation would take place within the scope of a particular armed conflict, it is sufficient that the facts as they have been represented to us here, in combination, support the judgment that DoD’s operation in Yemen would be conducted as part of the [NIAC] between the [U.S.] and al-Qaida.”⁵⁰¹ The OLC elaborated:

Specifically, DoD proposes to target a leader of AQAP, an organized enemy force that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy. Moreover, DoD would conduct the operation in Yemen, where, according to-the [*sic*] facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the targeted individual himself, on behalf of that force, is continuously planning attacks from that Yemeni base of operations against the United States, *as* the conflict with al-Qaida continues. Taken together, these facts support the conclusion that the DoD operation would be part of the [NIAC] the Court recognized in *Hamdan*.⁵⁰²

For our purposes here, this OLC memorandum may be relevant for four reasons. First, with respect to the scope of armed conflict, the OLC expressly rejected “the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict ... unless and until the hostilities become sufficiently intensive and protracted within that new location.”⁵⁰³

Second, the OLC characterized AQAP as “an organized enemy force that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy.”⁵⁰⁴ In doing so, the OLC utilized a legal concept of “co-belligerency”—which has traditionally arisen only in relation to IACs—in relation to a purported NIAC.⁵⁰⁵ The OLC also thereby articulated notions of a “comprehensive armed conflict” and a “principal enemy.”⁵⁰⁶

Third, it is not clear if, under the OLC’s analysis, the “significant and organized presence”⁵⁰⁷ of AQAP in Yemen is a prerequisite for the extension of the purported

500. *Id.* (citations omitted).

501. *Id.* (citations omitted).

502. *Id.* (emphasis original; citations omitted).

503. *Id.* at 138.

504. *Id.* at 140.

505. For an analysis of the concept, with a focus on its use in the U.S. context, see Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT’L L. 67 (2016).

506. *Al-Aulaki Memorandum*, *supra* note 486, at 140.

507. *Id.*

NIAC to Yemen. Nor is it clear whether the fact, as relayed to the OLC, that “AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States”⁵⁰⁸ is also a prerequisite for the extension of the purported NIAC to Yemen.

Fourth, in emphasizing that “the targeted individual himself, on behalf of [AQAP], is continuously planning attacks from that Yemeni base of operations against the [U.S.], as the conflict with al-Qaida continues,”⁵⁰⁹ the OLC raised the issue of whether someone who *non*-continuously plans attacks could (also), under this approach, be considered susceptible to lethal targeting in direct attack as part of the purported “comprehensive” NIAC with al-Qaeda.⁵¹⁰

These remaining questions regarding the OLC interpretation are thus relevant not only to the question of the scope of the purported NIAC with al-Qaeda and the relevant targeting authorities that such a NIAC would entail but also, and relatedly, to the stakes of determining when that NIAC ends.

Presidential Policy Guidance (PPG) concerning Direct Action Against Terrorist Targets Located Outside the U.S. and “Areas of Active Hostilities”

Three years after the Al-Aulaqi memorandum, the OLC produced a Presidential Policy Guidance (PPG)⁵¹¹ titled “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities.” Dated May 22, 2013 and released publicly⁵¹² (with redactions) on August 5, 2016 (pursuant to a court order⁵¹³), the PPG purports generally to “establish[] the standard operating procedures for when the United States takes direct action, which refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities.”⁵¹⁴

The PPG claims to reflect, in light of existing legal obligations, the policy choices of the Obama Administration; thus, the PPG does not create any new legal obligation. The Trump Administration (or a subsequent administration) may therefore withdraw the PPG and adopt different policy choices, although any administration would still be bound to comply with rules and principles embedded

508. *Id.*

509. *Id.* (emphasis original).

510. *Id.*

511. PPG, *supra* note 377.

512. The Government had already publicly disclosed, in a “Fact Sheet” that was released in May 2013, certain information contained in the PPG. Before it was released publicly (with redactions), the PPG had been characterized by Judge McMahon of the U.S. District Court of the Southern District of New York as “a fairly comprehensive outline of the procedures that the Administration goes through and the factors it analyzes when deciding whether to target for killing a terrorist suspect located outside this country but not in a so-called ‘hot war’ zone.” *Am. Civil Liberties Union v. Dep’t of Justice*, No. 15 CIV. 1954 (CM), 2016 WL 889739, at 1–2 (S.D.N.Y. Mar. 4, 2016). Not specific to any particular decision, the Fact Sheet, according to Judge McMahon, “is more like a primer, or in legal terms, a hornbook or treatise, outlining considerations that would go into making a decision about whether to target a particular person or entity.” *Id.* (citation omitted).

513. See American Civil Liberties Union, *Court Ordered Release of Documents in ACLU FOIA Case*, Press Release, Aug. 6, 2016, <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit> <<https://perma.cc/3JWM-4H9B>>.

514. PPG, *supra* note 377, at 1.

in the PPG that are reflective of legal obligations.⁵¹⁵

Even before the PPG was made public (in redacted form), in April 2016 State Department Legal Adviser Brian Egan stated that “[t]he phrase ‘areas of active hostilities’ is not a legal term of art—it is a term specific to the PPG. For the purpose of the PPG, the determination that a region is an ‘area of active hostilities’ takes into account, among other things, the scope and intensity of the fighting.”⁵¹⁶ At that time, Egan noted that “[t]he Administration currently considers Afghanistan, Iraq, and Syria to be ‘areas of active hostilities,’ which means that the PPG does not apply to operations in those States.”⁵¹⁷

Concerning the substance of the PPG, Egan emphasized that “the PPG imposes certain heightened policy standards that exceed the requirements of the law of armed conflict for lethal targeting.”⁵¹⁸ President Obama established the PPG, according to Egan, “out of a belief that implementing such heightened standards outside of hot battlefields is the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.”⁵¹⁹ Egan also stated that, “[o]f course, the President always retains authority to take lethal action consistent with the law of armed conflict, even if the PPG’s heightened policy standards may not be met.”⁵²⁰

The PPG generally holds that “international legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on the ability of the [U.S.] to act unilaterally – and on the way in which the [U.S.] can use force – in foreign territories.”⁵²¹

Operationally, the PPG states that “[c]apture operations offer the best opportunity for meaningful intelligence gain from counterterrorism (CT) operations and the mitigation and disruption of terrorist threats.”⁵²² “Consequently,” under the PPG, “the United States prioritizes, as a matter of policy, the capture of terrorist suspects as a preferred option over lethal action and will therefore require a feasibility assessment of capture options as a component of any proposal for lethal action.”⁵²³ The PPG states, in general terms, that “[l]ethal action should be taken in an effort to prevent terrorist attacks against U.S. persons only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat.”⁵²⁴ In addition, under the PPG, “[l]ethal action should not be proposed or

515. See Presidential Memorandum, Plan to Defeat the Islamic State of Iraq and Syria § 2(ii)(B), Jan. 28, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/28/plan-defeat-islamic-state-iraq> <<https://perma.cc/K24E-XLDL>> (stating that, “[w]ithin 30 days, a preliminary draft of the Plan to defeat ISIS shall be submitted to the President by the Secretary of Defense” and that that “[t]he Plan shall include: ... recommended changes to any United States rules of engagement and other United States policy restrictions that exceed the requirements of international law regarding the use of force against ISIS”) (emphasis added).

516. Egan, *Counter-ISIL Campaign*, *supra* note 373.

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*

521. PPG, *supra* note 377, at 1–2.

522. *Id.* at 1.

523. *Id.*

524. *Id.*

pursued as a punitive step or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission.”⁵²⁵ Capture, according to the PPG, “is preferred even in circumstances where neither prosecution nor third-country custody are available disposition options at the time.”⁵²⁶

“Non-combatants,” for purposes of the PPG, are expressly “understood to be individuals who may not be made the object of attack *under the law of armed conflict*.”⁵²⁷ In defining who those are, the PPG states, somewhat confusingly, that “[t]he term ‘non-combatant’ does not include an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense.”⁵²⁸ Consider that:

- “[A]n individual who is targetable as part of a belligerent party to an armed conflict” is an IHL concept;
- “[A]n individual who is taking a direct part in hostilities” is an IHL concept; yet
- “[A]n *individual who is targetable in the exercise of national self-defense*”⁵²⁹ is not, on its terms, an IHL concept. Rather, that category seems to mix a purported law-enforcement concept under IHRL (in the sense that the category focuses on an *individual* not expressly connected with a party to, or directly participating in hostilities in, an armed conflict—though, it bears emphasis, it is not clear on what basis an *individual* could be *targetable* under IHRL) with a use-of-force concept under the *jus ad bellum* (in the sense of exercising *national self-defense*). This category thus runs the risk of expanding the list of possible targets of direct lethal operations beyond what IHL permits.

Section 1.C.8. of the PPG details more specific guidelines for operational plans. That section states that “[a]ny operational plan for taking direct action against terrorist targets [redacted] shall, among other things, indicate with precision” certain enumerated elements.⁵³⁰ One set of those elements is framed as follows:

[O]perational plan for taking direct action against terrorist targets include at a minimum the following: (a) near certainty that an identified HVT [high-value terrorist] or other lawful terrorist target other than an identified HVT is present; (b) near certainty that non-combatants will not be injured or killed; (c) [redacted] and (d) if lethal force is being employed: (i) an assessment that capture is not feasible at the time of the operation; (ii) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (iii) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.⁵³¹

525. *Id.*

526. *Id.*

527. *Id.* (emphasis added).

528. *Id.*

529. *Id.* (emphasis added).

530. *Id.* at 3.

531. *Id.* (citation omitted).

There is a potential that, in practice, the PPG might be operationalized in a way that results in a desirable outcome, possibly including fewer “non-combatant”—as that term is defined through a concerning mixture of concepts drawn from distinct fields of international law—deaths. Yet the PPG raises potential risks as well. Perhaps the biggest is that the PPG might be operationalized in a way that results in unlawful harm—even death—from an attack directed against an individual who is not susceptible to lethal targeting in direct attack under international law.⁵³² Another risk concerns the introduction of the new category of “areas of active hostilities” (even though it was subsequently recognized as not constituting a “legal term of art”⁵³³). That category might lead to further confusion (and, possibly, unlawful harm due to that confusion) regarding when, where, and against whom, exactly, the U.S. considers itself to be engaged—and, as a matter of international law, when, where, and against whom, exactly, it *is* engaged—in individual or collective national self-defense, in armed conflict, or in law-enforcement operations (or in some combination thereof).

Spanning out, we see that, through recent U.S. jurisprudence, practice, and doctrine, a complicated mixture has arisen: various purported armed conflicts against terrorist organizations interwoven with “direct action” against terrorist threats outside the United States and “areas of active hostilities.” This mixture has made it difficult to identify what constitutes an armed conflict, to classify relevant purported conflicts, to discern who the parties to those conflicts are, to delimit the geographical scope of those conflicts, and to ascertain the end of those conflicts.

532. See *supra* this section. For an overview of the IHL concept of combatants, see, e.g., Marco Sassòli, *Combatants*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015). For the argument that many U.S.-based humanitarian and human rights lawyers and advocates helped to shape the Obama Administration’s articulation of its legal basis for the use of force against al-Qaeda and others by making use of “folk international law,” “a law-like discourse that relies on a confusing and soft admixture of IHL, *jus ad bellum*, and IHRL to frame operations that do not, ultimately, seem bound by international law—at least not by any conception of international law recognizable to international lawyers, especially those outside of the U.S.,” see Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT’L SEC. J. 225 (2014).

533. Egan, *Counter-ISIL Campaign*, *supra* note 373.

8

FOUR THEORIES ON THE END OF NON-INTERNATIONAL ARMED CONFLICT

INTRODUCTION

Even though NIACs are the most common type of contemporary armed conflict,⁵³⁴ there are, as we illustrated in Section 5, fewer IHL provisions and rules concerning how NIACs end compared to IACs. In this section, drawing from existing international law and scholarly arguments, we postulate and scrutinize four theories on the vanishing point of the application of the international-legal framework of armed conflict in relation to NIAC:

- The two-way-ratchet theory;
- The no-more-combat-measures theory;
- The no-reasonable-risk-of-resumption theory; and
- The state-of-war-throwback theory.

In certain respects, these theories may be over- or under-inclusive. None has attained consensus in either law or commentary. Moreover, none, on its own, presents a sufficiently totalizing theory to address all the normative, practical, and legal concerns that may arise with respect to the discontinuance of the application of IHL to NIAC.

A prefatory point is in order. We do not include a standalone theory covering the factual situation where IHL of NIAC ceases to apply to the situation once it transforms into an IAC, at which point IHL of IAC immediately applies.⁵³⁵ The transformation of a NIAC into an IAC is possible, for instance, where the acts of a non-state organized armed group fighting a state's armed forces become attributable to another state.⁵³⁶ IHL applies throughout. Thus, the exceptional state of affairs, with its attendant extraordinary measures that are tolerated by IHL, continues. The

534. See, e.g., *THE WAR REPORT: ARMED CONFLICT IN 2014* 23–25 (Annyssa Bellal ed., 2015).

535. Nor do we address the termination of IHL protections in relation to a person deprived or restricted of liberty even after the conflict has ended; see *supra* notes 287–88 and corresponding text.

536. See Ferraro, *Foreign Intervention*, *supra* note 32.

key classification question—with implications for the end of NIAC—is whether those powers are governed under the IHL of NIAC or the IHL of IAC.

FOUR THEORIES

The Two-Way-Ratchet Theory

According to this theory, a NIAC ends and the international-legal framework of armed conflict ceases to apply in relation to it *as soon as at least one of the constituent elements of the NIAC ceases to exist*. As noted in Section 5, jurisprudence of the ICTY and the ICC indicate that the constituent elements of a NIAC are (1) a sufficient level of organization of the non-state armed group or groups (the state is assumed to be sufficiently organized) and (2) a sufficient intensity of violence.⁵³⁷ Thus, under the two-way-ratchet theory, the NIAC would end—and the international-legal framework of armed conflict would cease to apply in relation to it—as soon as the level of organization of the non-state armed group (or, as relevant, groups) *or* the intensity of violence falls below the threshold necessary for the NIAC to have existed in the first place. Despite being pegged to the ICTY’s formulation of the constituent elements necessary to determine the existence of a NIAC, the two-way-ratchet theory rejects the approach of an ICTY Trial Chamber concerning the end of armed conflict. (Recall that, in *Haradinaj*, an ICTY Trial Chamber held that until a peaceful settlement is achieved, “there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict....”⁵³⁸)

Some international-law scholars have endorsed the general idea underlying the two-way-ratchet theory, if by different names.⁵³⁹ Marko Milanovic, for instance, articulates a general principle: “unless there is a good reason of text, principle or policy that warrants an exception, the application of IHL will cease once the conditions that triggered its application in the first place no longer exist.”⁵⁴⁰

In situations where the intensity of the violence or the organization of the armed group fluctuates (or where both oscillate), the two-way-ratchet theory may

537. See *supra* Section 5. As to whether the violence must also be protracted, in the sense of a minimally long duration, see *id.*

538. *Haradinaj*, Trial Judgment, *supra* note 312, at ¶ 100.

539. In a similar vein, expounding on an idea from Jeh Johnson and in the context of debates around U.S. legal domestic authorizations for use of force, Bill French and John Bradshaw enumerate three “tipping points.” Bill French with John Bradshaw, *Ending the Endless War: An Incremental Approach to Repealing the 2001 AUMF*, NATIONAL SECURITY NETWORK, Aug. 2014, https://www.justsecurity.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_FINAL.pdf <<https://perma.cc/4PCH-K4DZ>>. The first tipping point (coined the strategic-attack tipping point) is where an enemy belligerent has been “sufficiently degraded so that it can no longer threaten strategic attack beyond the capacity of law enforcement to manage.” *Id.* at 12. The second tipping point (termed the regional-attack tipping point) would arise “when [organizations with regional reach] have been degraded to the point of not being able to participate effectively in hostilities against U.S. assets in a given region or area.” *Id.* at 12. And the third tipping point (called the no-longer-a-co-belligerent tipping point) would arise when a so-called “co-belligerent”—which is not, however, a legally recognized concept in the IHL of NIAC—of the primary enemy belligerent “has left the fight or, more likely, the organization that it was co-belligerent with has been defeated.” *Id.* at 13.

540. Milanovic, *End of IHL Application*, *supra* note 13, at 170.

lead, in practice, to a revolving door of applicability and non-applicability of IHL. As noted above, an ICTY Trial Chamber warned against the dangers of such a revolving door, which could, in the Chamber's view, lead to a "considerable degree of legal uncertainty and confusion."⁵⁴¹

Seeking in part to mitigate such uncertainty and confusion, some states have adopted rules of engagement (ROEs). The Colombian Ministry of Defence, for instance, adopted an *Operational Law Manual* that was published in 2009.⁵⁴² That *Manual* concludes that the situation in Colombia involved the parallel application of IHL and human rights law, and introduces concrete ROEs concerning the Colombian situation.⁵⁴³ The *Operational Law Manual's* authors developed the ROEs based on two sets of cards: the so-called "blue card is meant to deal with law enforcement operations," and the so-called "red card addresses combat operations, i.e. when force is used against military objectives."⁵⁴⁴ The battalion commander decides whether to use the blue card or the red card.⁵⁴⁵ In a situation of belligerent occupation, the Occupying Power is obliged to restore and maintain public order and safety, as far as possible.⁵⁴⁶ That obligation "has long made the Occupying Power responsible for policing the inhabitants of the occupied territory."⁵⁴⁷ The maintenance of such security "involves an integration, and at times an overlap, of effort between law enforcement and military forces."⁵⁴⁸ Some Occupying Powers adopt ROEs to regulate that effort. Those ROEs are rarely made public, though parts of one were disclosed in a 2013 Israeli Military Court District judgment convicting, after a plea bargain, a soldier of "causing death by negligence ... by

541. See *supra* note 67 and the corresponding text. That part of that ICTY Trial Chamber's reasoning concerned an international armed conflict, and, as part of that analysis, that Chamber expressly rejected the defense's submission that a significant decrease in the level of intensity of violence or in the level of organization of one of the parties (or both) could terminate the applicability of IHL. *Gotovina*, Trial Judgement, *supra* note 67, at ¶ 1694.

542. See ICRC, *USE OF FORCE*, *supra* note 3, at 81.

543. *Id.* On the interplay between IHL and IHRL in the context of Colombia, see Pablo Kalmanovitz, *Ius Post Bellum and the Imperative to Supersede IHL*, 110 AM. J. INT'L L. UNBOUND 193 (2016).

544. ICRC, *USE OF FORCE*, *supra* note 3, at 46.

545. *Id.* at 46 n.116.

546. With respect to a situation of belligerent occupation, Article 43 of the Hague Regulations lays down that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." (Note that the official French text of Article 43 of the Hague Regulations refers to "l'ordre et la vie publics.") See also Article 64(3) GC IV (providing that "[t]he Occupying Power may ... subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations ... to maintain the orderly government of the Territory...") And, as Kenneth Watkin explains, GC IV further "requires that 'protected persons' are protected against all acts or threats of violence, and establishes rules governing the maintenance of laws, courts, internment, and so forth." Kenneth Watkin, *Use of force during occupation: law enforcement and conduct of hostilities*, 94 INT'L REV. RED CROSS 267, 270 n.13 (2012) [hereinafter, "Watkin, *Use of force*"] (citing to Articles 27 and 47 *et seq.* GC IV). Watkin explains that "neither the Hague Regulations, nor the Geneva Conventions, nor Additional Protocol I refer directly to policing, although such activity is an inherent part of the detention, internment, and prosecution of criminals or security detainees authorized by humanitarian law." *Id.* (citing to Articles 64–78 GC IV).

547. Watkin, *Use of force*, *supra* note 546, at 314.

548. *Id.*

carrying out firing against the rules of engagement” in the West Bank.⁵⁴⁹

Another possible downside to the two-way-ratchet theory is that for many NIACs, it will be difficult to determine contemporaneously whether the violence continues to be sufficiently intense⁵⁵⁰ or whether the relevant non-state armed group continues to be sufficiently organized (or both). In Afghanistan, for instance, fluctuations in violence have seemed at times to correlate with the changing seasons.⁵⁵¹ The theory may also be frustrated—or, at least, unevenly implemented—if its application turns on the undisclosed intelligence assessments of a state party. For example, a state party may determine, according to secret intelligence analysis, that a non-state armed group has functionally disbanded and, through that analysis, ascertain the end of the conflict. Meanwhile, for those without access to that analysis, the conflict might appear to continue.

Bartels notes that some of the “indicative factors” of the existence of a NIAC articulated by the ICTY (which underlie the two-way-ratchet theory) may be difficult to apply “in reverse.”⁵⁵² The attention of the U.N. Security Council to the situation, for example, may vary or recede.⁵⁵³ Examining ongoing damage might be difficult because “[a] drop in the number of strikes carried out, or in the case of an air campaign, the number of sorties flown, could be the result of a decreasing number of military objects that can be legitimately targeted, rather than the result of a diminishing intensity.”⁵⁵⁴ Bartels suggests not only detecting the absence of the “indicative factors” enumerated by the ICTY but also seeking signs of the close of the NIAC. One such indicator that he raises is the number of civilians returning home (while recognizing that other factors might cause refugees or internally dispersed persons not to return).⁵⁵⁵ Another such indicator that he raises is the effectiveness of the disarmament process (as measured in the number, type, and amount of weapons handed in compared, for example, to the earlier numbers of fighters or the type and make of weapons used

549. See Amnesty International, *Trigger-Happy: Israel's Use of Excessive Force in the West Bank*, MDE 15/002/2014, Feb. 2014, p. 13 (stating that “[t]his directive set out rules to be followed by all army soldiers deployed in the West Bank and in the zone around the fence/wall. These specify that soldiers must avoid and refrain from harming ‘non-combatant’ Palestinian civilians, particularly women and children, and instruct soldiers that they must use their weapons only as a last resort; the directive states that the ‘necessity of firing’ is to be examined at every stage, and, as far as possible, directly by the commander who is in charge or according to his order”) (citations omitted). On the status and approach under Israeli law concerning the *de jure* and *de facto* applicability (or not) of certain IHL provisions in relation to the West Bank, see, e.g., Dvir Saar and Ben Wahlhaus, *Preventive Detention for National Security Purposes – The Three Facets of the Israeli Experience*, in DETENTION OF NON-STATE ACTORS ENGAGED IN HOSTILITIES 240–41 n.224 (Gregory Rose and Bruce Oswald eds., 2016).

550. And, if relevant, protracted; see *supra* Section 5.

551. See Alice Sperti, *It's Spring in Afghanistan, Time for Taliban Fighting Season*, VICE NEWS, May 12, 2014, <https://news.vice.com/article/its-spring-in-afghanistan-time-for-taliban-fighting-season> <<https://perma.cc/SUT5-54PV>> (quoting a security analyst focusing on Pakistan and Afghanistan as stating that “[t]he Taliban launches a spring offensive each year around this time and the reason for that is that the weather is changing”).

552. Bartels, *When NIACs End*, *supra* note 13, at 309.

553. *Id.*

554. *Id.* at 309 n.68.

555. *Id.* at 309.

in the hostilities).⁵⁵⁶

The No-More-Combat-Measures Theory

According to this theory, a NIAC ends and the international-legal framework of armed conflict ceases to apply in relation to it *upon the general close of military operations as characterized by the cessation of actions of the armed forces with a view to combat*. This theory is rooted in the “general close of military operations” formulation, which was established in relation to IAC in Articles 6(2)–(3) of GC IV and 3(b) of AP I and which has been addressed (in relation to IACs) by some scholars.⁵⁵⁷

As noted in Section 4, the ICRC defines such “military operations” (in the sense of the antecedent IHL-of-IAC treaty provisions) as “the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat.”⁵⁵⁸ If that definition is adopted in the context of a NIAC, then, under the no-more-combat-measures theory, military operations (even in the absence of active hostilities) that have a continuing nexus with the NIAC—such as redeploying forces along the front to build up military capacity or mobilizing or deploying forces for defensive or offensive purposes—will justify the maintenance of the classification of the situation as a NIAC.⁵⁵⁹

Under this theory, once actions carried out by one of the parties to the NIAC with a view to combat cease, the NIAC will terminate, at least with respect to that party. In principle, that NIAC could continue as between other parties (assuming that there were and continue to exist two or more *other* parties to the NIAC) so long as those other parties have not ceased actions by their respective armed forces with a view to combat.

The No-Reasonable-Risk-of-Resumption Theory

According to this theory, a NIAC ends and the international-legal framework of armed conflict ceases to apply in relation to it where *there is no reasonable risk of hostilities resuming*. This theory pegs the continued applicability of IHL of NIAC on a “reasonableness” assessment—admittedly vague as that standard might be—of the threat of further hostilities.

In a sense, the no-reasonable-risk-of-resumption theory imposes a lower standard than the two-way-ratchet theory. That is because the no-reasonable-risk-of-resumption theory does not turn on either the organization criterion or the intensity criterion falling below the thresholds necessary for the NIAC to exist in the first place. The no-reasonable-risk-of-resumption theory recognizes that the intensity of the conflict might oscillate, but the theory places a premium on the clarity of the applicable legal framework. On the upside, the operation of this theory is designed to make it harder for parties to argue that no law applies (which may be especially important where, in practice, the application of IHRL is contested) or that it was not apparent whether at least IHL governed a party’s

556. *Id.*

557. See, e.g., GRIGNON, L’APPLICABILITÉ TEMPORELLE, *supra* note 13, at 275–82.

558. COMMENTARY ON THE APs, *supra* note 68, at 67.

559. For relevant analysis concerning IAC, see GC I 2016 COMMENTARY, *supra* note 68, at ¶ 279.

conduct. On the downside, this theory risks extending the application of IHL, including the relevant extraordinary measures that IHL tolerates. In practice, as with the two-way-ratchet theory, the no-reasonable-risk-of-resumption theory may also be frustrated—or, at least, unevenly implemented—where its application turns on the undisclosed intelligence assessments of a party.

The no-reasonable-risk-of-resumption theory captures part of the rationale underlying the U.S.’s “tipping point” formulation concerning the possible end of the War on Terror. (Recall that that basic theory is that, “[a]t a certain point, the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa’ida to such an extent that they will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States.” At that “tipping point,”⁵⁶⁰ “there will no longer be an ongoing armed conflict between the United States and those forces.”⁵⁶¹) Yet, the no-reasonable-risk-of-resumption theory requires that, for the IHL of NIAC to continue to be applicable, there must be a reasonable risk of resumption of hostilities—not (only) on the capacity of a terrorist organization to launch a strategic attack against the U.S. mixed with will to do so.

Legal experts have outlined some of the basic contours of the no-reasonable-risk-of-resumption theory. Derek Jinks, for instance, suggests that the end of an armed conflict arrives when “there is *no probability of a resumption of hostilities in the near future*.”⁵⁶² In the view of the ICRC, “a lasting cessation of armed confrontations without real risk of resumption” will “undoubtedly constitute the end of a NIAC.”⁵⁶³ Further, the ICRC states that such a cessation would also “equate to a peaceful settlement of the conflict, even without the conclusion or unilateral pronouncement of a formal act such as a ceasefire, armistice or peace agreement.”⁵⁶⁴ More generally, the ICRC argues that “[i]t is impossible to state in the abstract how much time without armed confrontations needs to pass to be able conclude with an acceptable degree of certainty that the situation has stabilized and equates to a peaceful settlement.”⁵⁶⁵ According to the ICRC, “it is not yet possible to conclude that a situation has stabilized, and a longer period of observation will be necessary,” where, for instance, a “Party may ... decide to

560. See Johnson, *How Will It End?*, *supra* note 356.

561. *Legal and Policy Frameworks Report*, *supra* note 356, at 11–12 (citing to Johnson, *How Will It End?*, *supra* note 356); see also Preston, *Legal Framework*, *supra* note 360.

562. Jinks, *The Temporal Scope*, *supra* note 13, at 3 (stating that, “[g]iven the de facto ‘armed conflict’ regime of the Geneva Conventions, the general applicability of international humanitarian law terminates if active hostilities cease and *there is no probability of a resumption of hostilities in the near future*”. Emphasis added. This theory also draws on the interpretation in the U.K. Ministry of Defence’s *The Joint Service Manual of the Law of Armed Conflict* (2004) of the main IHL-of-IAC provision concerning the release of prisoners of war. As discussed above, under Article 118(1) of GC III, “[p]risoners of war shall be released and repatriated without delay after the cessation of hostilities.” According to the U.K. Ministry of Defence’s *The Joint Service Manual on the Law of Armed Conflict* (2004), that “[c]essation of active hostilities’ is a question of fact and does not depend on the existence of an armistice agreement. Active hostilities have ceased *where there is no immediate expectation of their resumption*.” That *Manual* also stipulates, in this connection, that “[c]essation is not affected by isolated and sporadic acts of violence.” *Id.*

563. GC I 2016 COMMENTARY, *supra* note 68, at 491.

564. *Id.*

565. *Id.* at ¶ 492.

temporarily suspend hostilities, or the historical pattern of the conflict may be an alternation between cessation and resumption of armed confrontations.”⁵⁶⁶ At the same time, “[h]owever, the lasting absence of armed confrontations between the original Parties to the conflict may indicate – depending on the prevailing facts – the end of that [NIAC], even though there might still be minor isolated or sporadic acts of violence.”⁵⁶⁷ The example elements that the ICRC identifies “that may indicate that a situation has sufficiently stabilized to consider that a [NIAC] has ended” include the following:

- The effective implementation of a peace agreement or ceasefire;
- Declarations by the parties, not contradicted by the facts on the ground, that they definitely renounce all violence;
- The dismantling of government special units created for the conflict;
- The implementation of disarmament, demobilization and/or reintegration programs;
- The increasing duration of the period without hostilities; and
- The lifting of a state of emergency or other restrictive measures.⁵⁶⁸

(A definitive and complete surrender, as in the case of Sri Lanka in 2009,⁵⁶⁹ by one of the two parties might also, it would seem, suffice under this approach.)

At base, this ICRC approach stresses “a full appraisal of all the available facts,” while recognizing that “such predictions can never be made with absolute certainty” and that “[i]t is not a perfect science.”⁵⁷⁰ Ultimately, “in the view of the ICRC, it is preferable not to be too hasty and thereby risk a ‘revolving door’ classification of a conflict which might lead to legal uncertainty and confusion.”⁵⁷¹

The State-of-War-Throwback Theory

According to this theory, a NIAC ends and the international-legal framework of

566. *Id.*

567. *Id.* at ¶ 494.

568. *Id.* at ¶ 495.

569. For an overview of the end stages of that conflict and of violations committed therein, *see* Report of the OHCHR Investigation on Sri Lanka (OISL), UN Doc. A/HRC/30/CRP/2 (Sept. 16, 2015).

570. GC I 2016 COMMENTARY, *supra* note 68, at ¶ 496.

571. *Id.* (internal footnote citation omitted). In a certain sense, the ICRC also might be seen as following the general approach of the two-way-ratchet theory, although with some meaningful variations. For instance, the ICRC recognizes that a NIAC “can cease by the mere fact that one of the Parties ceases to exist. A complete military defeat of one of the Parties, the demobilization of a non-State Party, or any other dissolution of a Party means that the armed conflict has come to an end, even if there are isolated or sporadic acts of violence by remnants of the dissolved Party.” *Id.* at ¶ 489. In principle, however, the two-way-ratchet theory does not require the complete annihilation of the non-state organized armed group. On the other hand, the ICRC states that “it is not possible to conclude that a [NIAC] has ended solely on the grounds that the armed confrontations between the Parties have fallen below the intensity required for a conflict to exist in the first place.” *Id.* at ¶ 494 (citations omitted). In the view of the ICRC, “a temporary lull in the armed confrontations must not be taken as automatically ending the [NIAC].” *Id.* at ¶ 492. Rather, the ICRC prefers an assessment that is based on the factual circumstances and that takes “into account the often fluctuating nature of conflict to avoid prematurely concluding that a [NIAC] has come to an end.” *Id.* at ¶ 493.

armed conflict ceases to apply in relation to it *upon the achievement of a peaceful settlement between the formerly-warring parties*. This theory is rooted, in part, in an element of the traditional state-of-war doctrine, whereby a state of war in the legal sense would continue to exist until the conclusion of a war-terminating instrument, such as a treaty of peace.⁵⁷² The state-of-war-throwback theory presumes that the parties to a NIAC are capable in principle of agreeing to end the conflict and in practice of exercising sufficient control over their relevant components in order to effectively implement that agreement. Since most non-state organized armed groups are, in general, not considered capable of contracting into treaties,⁵⁷³ the focus in this theory is on achieving a peaceful “settlement,” such as in the form of a durable agreement between the parties.

The primary international-legal root of this theory is the end-of-application-of-IHL-to-NIAC formulation—“until ... a peaceful settlement is achieved”—that was laid down by the ICTY Appeals Chamber in *Tadić* and that was endorsed recently by an ICC Trial Chamber in *Bemba*.⁵⁷⁴ The notion of such a “peaceful settlement” seems to concern not only putting the factual situation on a permanent footing but also a more formal, subjective element, akin, perhaps, in certain respects, to a treaty of peace under the traditional state-of-war doctrine. Interpreted with these subjective elements in mind, the “peaceful settlement” formulation is at variance with the fact-centered approach that arose with the notion of “armed conflict”—including NIAC—in the Geneva Conventions of 1949.⁵⁷⁵

An advantage of the more formal, subjective approach of the state-of-war-throwback theory is that it may dissipate some of the concerns that arise with purely fact-based approaches. (For its part, the ICRC seems to interpret the “peaceful settlement” standard in the *Tadić* formulation as not requiring an explicit, formal, subjective agreement, as such.⁵⁷⁶) A disadvantage is that a government may refuse to recognize a non-state organized armed group (or vice versa), such that a party rejects even the possibility of entering a formal agreement with an adverse side. Nor is it clear if the state-of-war-throwback theory encompasses a complete and definitive surrender by one of the parties.

572. See *supra* Section 4.

573. But see, e.g., Article 96(3) AP I; see also *supra* Section 5.

574. *Bemba*, Trial Judgment, *supra* note 273, at ¶ 141.

575. In this connection, as noted earlier, Kleffner avers that this *Tadić* marker “only holds true to the extent that the ‘peaceful settlement’ is not a matter of mere agreement, but is also an accurate description of the factual situation on the ground.” Kleffner, *Peace Treaties*, *supra* note 86, at ¶ 11.

576. GC I 2016 COMMENTARY, *supra* note 68, at ¶¶ 478, 490 (citations omitted) (and noting that, “while the existence of such agreements may be taken into account when assessing all of the facts, they are neither necessary nor sufficient on their own to bring about the termination of the application of humanitarian law”). *Id.* at ¶ 490.

CONCLUSION

Our study reveals that international law, as it now stands, provides insufficient guidance to precisely ascertain the end of many armed conflicts as a *factual matter* (when *has* the war ended?), as a *normative matter* (when *should* the war end?⁵⁷⁷), and as a *legal matter* (when does (a portion of) the international-legal framework of armed conflict *cease to apply* in relation to the war?). The current plurality of legal concepts of armed conflict, the sparsity of IHL provisions that instruct the end of application, and the inconsistency among such provisions (sometimes, even within a single legal instrument) thwart uniform regulation and frustrate the formulation of a comprehensive notion of when wars can, should, and do end.⁵⁷⁸

The architects of the 1949 Geneva Conventions left open the possibility, but removed the need, for the subjective and formal political recognition of war. In doing so, they meant to make it easier to discern, as an objective and factual matter, when IHL applied so that it would be harder for states to evade it. That was a laudable goal and an understandable strategic move following the carnage of WWII. And, in respect of many subsequent conflicts, that goal was at least partly realized. But delinking the political recognition of war from its prosecution may also inflict costs. In today's complex world of armed conflicts, we may be less likely to know armed conflicts when we see them. Not knowing when armed conflicts begin frustrates efforts to know when wars can and should end. And, even if we think we do see them, the objective, fact-based model exposes a weakness where a relevant political authority refuses to recognize the existence of the conflict.

Paradoxically, we now also seem more likely, in certain respects, to see armed conflict everywhere.⁵⁷⁹ Amid countless “wars” (on terror, drugs, crime, and the like), the traditional legal framework of armed conflict has lost some of its salience as a marker of exception and emergency. Conversely, aided in part by the ICJ's approach to the “general law” of human rights giving way at times to the “special law” of armed conflict, the concept of war as an institution of international law seems to be witnessing something of a recrudescence.⁵⁸⁰

Against this backdrop, an array of challenges on the end of conflict emerges. Due to the nature of many modern armed conflicts, it is rarely possible to discern when the last shot has been fired except after the fact, sometimes long after. Moreover, traditional approaches to delineating the scope of application of IHL to an armed conflict—in its material, geographic, personal, and temporal dimensions—are often strained where the enemy is a protean terrorist network with operations spanning

577. See Gabriella Blum and David Luban, *Unsatisfying Wars: Degrees of Risk and the Jus ex Bello*, 125 ETHICS 751 (2015).

578. See *supra* Sections 2, 4, and 5 outlining the contours of the international-legal concepts of international and non-international armed conflict. Milanovic raises the notion that NIAC is “plural concept” in the sense that NIAC is defined differently in different treaty regimes. Milanovic, *End of IHL Application*, *supra* note 13, at 179.

579. See Rosa Brooks, *There's No Such Thing as Peacetime*, FOREIGN POLICY, Mar. 13, 2015, <http://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/> <<https://perma.cc/3BFV-B9WU>>.

580. See NEFF, WAR, *supra* note 80, at 394.

international borders. Further, advancements in artificial intelligence and robotics raise prospects for profound changes to notions of war and warfighting.⁵⁸¹

In extending IHL “until ... a peaceful settlement is achieved,”⁵⁸² the primary judicially-sanctioned general international-legal formulation on the end of applicability of IHL to NIACs privileges legal clarity, the ongoing application of IHL, and continuous war-crimes jurisdiction. Yet the demand for a final and comprehensive peaceful settlement will rarely be met in many contemporary NIACs.⁵⁸³ (Indeed, it may be too high even in traditional IACs—recall that the U.S. and Germany never inked a peace treaty and did not reach a final settlement concerning WWII until 1990.) In the meantime, the continued applicability of IHL allows parties to access international-legal claims to employ harsher and more destructive power than would be tolerated solely under peacetime legal regimes, including IHRL.

Spanning out, we see that current international law does not provide a comprehensive normative theory to know when armed conflicts have achieved their legitimate aims. Nor do we understand what linkages should be drawn between the legal thresholds for the initiation of armed conflict, the political and strategic articulation of the goals of war, and the criteria by which we should determine that armed conflict has ended.

Fleshing out the criteria for the end of war is a considerable challenge, and those looking to do so must address these concerns. Clearly, many of the problems we note here are first and foremost strategic and political.⁵⁸⁴ Yet, as part of a broader effort to strengthen international law’s claim to guide behavior in relation to war and protect affected populations, international lawyers must address the current confusion and inconsistencies that so often surround the end of armed conflict.

581. See Dustin A. Lewis, Gabriella Blum, and Naz K. Modirzadeh, *War-Algorithm Accountability*, HARV. L. SCH. PROGRAM ON INT’L L. & ARMED CONFLICT (HLS PILAC), Aug. 2016, <http://blogs.harvard.edu/pilac/files/2016/09/War-Algorithm-Accountability-August-2016.pdf> <<https://perma.cc/A5VW-SQC5>>; see generally BENJAMIN WITTES AND GABRIELLA BLUM, *THE FUTURE OF VIOLENCE* (2015).

582. See *supra* Section 5.

583. Even where a peace deal does exist, it may be threatened before the ink dries, as the recent surge in assassinations in Colombia demonstrates. See Nick Miroff, *The frightening issue that could destroy Colombia’s peace deal*, THE WASH. POST, Jan. 3, 2017, https://www.washingtonpost.com/world/the_americas/the-frightening-issue-that-could-destroy-colombias-peace-deal/2017/01/02/3e0a7fec-c304-11e6-92e8-c07f4f671da4_story.html <<https://perma.cc/7DE3-MSV2>>.

584. See McNAIR AND WATTS, *LEGAL EFFECTS*, *supra* note 82, at 11 (arguing that “[t]he circumstances of particular wars are so various, and their termination so frequently attended by great political complications, that it cannot be expected that the termination of all wars will fit tidily into any set of legal categories”).

HLS PILAC

PILAC.LAW.HARVARD.EDU